Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

JOEY L. MITCHELL

Petitioner,

v.

GLENN CHAPMAN, RICK DERRICKSON, NAEWANA NICHOLS, WILLIAM J. HENDERSON, AND THE UNITED STATES POSTAL SERVICE

Respondents.

On Petition For Writ Of Certiorari To The Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

JAMES M. MORRIS
Counsel of Record
MORRIS & MORRIS, P.S.C.
217 North Upper Street
Lexington, KY 40507
(859) 281-6981
Counsel for Petitioners

QUESTIONS PRESENTED

In analyzing Congressional intent, this Court has long held that the plain meaning of the statute dictates unless such interpretation leads to an absurd result. In fact, as early as 1850, this Court held in *U.S. v. Boisdore's Heirs*, 49 U.S. 113, 122 (1850), that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." Recently, in *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151, L.Ed.2d 908 (2002)(internal citations omitted), this Court admonished that a court "'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'"

The Family Medical Leave Act [hereinafter "FMLA"] clearly and unmistakably defines an employer as "any person who acts, directly or indirectly, in the interests of an employer to any of the employees of such employer," 29 U.S.C. § 2611(4)(A)(ii)(II), and specifically includes "public agencies" in the definition. Nevertheless, in its decision below, the United States Court of Appeals for the Sixth Circuit, stating that the issue was one of "first impression," engaged in a contorted and strained dissection of the statute's punctuation in concluding that individual liability does not extend to public agency employees.

In so ruling, the Sixth Circuit flatly rejected the decisions reached by the Eighth Circuit in *Darby v. Bratch*, 287 F.3d 673 (8th Cir. 2002), by the Eleventh Circuit in *Wascura v. Carver*, 169 F.3d 683 (11th Cir. 1999), and by numerous district courts that have held that the FMLA statute is clear and unambiguous.

In light of this Court's specific admonitions regarding

statutory interpretation, and given the chasm in authority that has now been created between the Circuits by and through the Sixth Circuit's stark departure from the vast majority, Petitioner respectfully requests that this Court accept certiorari on the following questions:

1. When the plain language of an underlying statute identifies that federal agency supervisors are subject to individual liability, does a decision of the Sixth Circuit Court of Appeals that rejects other Circuit Court decisions, and relies upon a strained analysis of the punctuation and language contained within the statute, conflict with and undermine the Congressional intent and the canons of statutory interpretation.

2. When a previous lawsuit is dismissed solely as a result of a party's failure to meet a condition precedent to filing suit as a jurisdictional bar, are all other claims not adjudicated in the previous action forever barred as a result of the dismissal.

PARTIES TO THE PROCEEDINGS

The parties below were petitioner Joey L. Mitchell (appellant below), and respondents Glenn Chapman, Individually and in his Official Capacity, Rick Derrickson, Individually and in his Official Capacity, Naewana Nichols, Individually and in her Official Capacity, William J. Henderson, Postmaster General, Individually and in his Official Capacity, and the United States Postal Service.

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PETITION FOR WRIT OF CERTIORARI

JOEY L. MITCHELL, Petitioner, by the undersigned counsel, under appropriate rules of this Court, respectfully petitions for this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

This action arose as an effort by the Petitioner to seek enforcement of the provisions of the Family Medical Leave Act, and other federally-mandated protections afforded federal employees. Unfortunately, the district court ignored long-standing legal precedent pertaining to the applicability of issue preclusion to matters involving a jurisdictional prerequisite, and ignored clear statutory language authorizing causes of action against public agency supervisors, and issued an Opinion and Order on April 6, 2001 [Appx. 39a], which held that all claims against the Postal Service were barred as a result of a previous decision declaring that Petitioner could not bring suit prior to exhausting his administrative remedies. The Opinion and Order also rejected Mitchell's claims against individual supervisors, declaring that the Family Medical Leave Act's provisions, which expressly authorize claims against supervisors, does not apply to public agency supervisors. Petitioner timely appealed to the Sixth Circuit Court of Appeals.

On September 11, 2003, the Sixth Circuit Court of Appeals declared that it was rejecting the positions set forth by the other Courts of Appeals and numerous district courts that had addressed this very issue, and, in an "issue of first impression," held that the specific punctuation of the underlying statute mandated a rejection of the long-standing canon of looking at the plain meaning of the statute. [Appx. 1a-37a.] In addition, the Court of Appeals upheld the district court's dismissal of Petitioner's claims, indicating that, although the previous litigation had been dismissed based solely upon Petitioner's

failure to meet a condition precedent, Petitioner was forever barred from raising any claims, whether related to the condition or not. The opinion of the Court of Appeals is reported at 343 F.3d 811. The district court's decision is not reported.

STATEMENT OF JURISDICTION

Subject matter jurisdiction for the United States District Court, Eastern District of Kentucky was invoked pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367(a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant statutes involved herein include the Family Medical Leave Act, 29 U.S.C. § 2601, *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*

STATEMENT OF THE CASE

On July 8, 1995, Mitchell was hired by the USPS as a letter carrier at the Paris, Kentucky post office. He is a veteran with a 20% service-connected disability involving tinnitus and chronic neck pain. On November 26, 1996, Mitchell's physician certified that he suffered from a chronic serious health condition under the FMLA which required an absence from work. When Mitchell returned from FMLA leave with a physician's release, his supervisor reprimanded him for being absent and demanded he produce another statement from his physician clearing him to work as a letter carrier. Despite providing the USPS with medical reports and releases indicating that Mitchell was released to full active duty, the USPS denied his request to be reinstated as a letter carrier, and requiring him to undergo further medical examinations.

Mitchell requested EEO counseling regarding his claim that he was discriminated against based on his disability. He then filed an administrative complaint alleging that he was

denied the accommodation of a waist harness. The USPS Office of EEO Compliance and Appeals subsequently dismissed the complaint based upon Mitchell's failure to contact the EEO counselor within 45 days of the discriminatory act. In November, 1998, Mitchell filed suit (*Mitchell I*), claiming that the USPS discriminated against him on the basis of his disability by failing to provide him with the accommodation of a waist harness in violation of the Rehabilitation Act and the ADA. In March, 1999, the district court entered a dismissal in favor of the USPS in *Mitchell I* on the ***sole*** ground that Mitchell had failed to contact an EEO counselor within the 45-day limit. The Order expressly avoided any discussion of the merits of Mitchell's claims.

On May 15, 2000, Mitchell filed the present action against the USPS and his supervisors, [hereinafter collectively referred to as "USPS"], raising claims that were not tied to the 45-day condition prerequisite dismissal, including the Family and Medical Leave Act ["FMLA"], 29 U.S.C. § 2601 *et seq.*; the Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq.*; and the Americans with Disabilities Act ["ADA"], 42 U.S.C. § 12101 *et seq*. On April 6, 2001, the district court entered an Opinion and Order granting the USPS's Fed.R.Civ.P. 12(b) Motion to Dismiss [Appx. 39a], and on September 11, 2003, the Sixth Circuit affirmed that decision. [Appx. 1a.] Mitchell's Petition for Rehearing was denied on December 23, 2003. [Appx. 38a.]

In upholding the dismissal of Mitchell's claims, the Sixth Circuit Court of Appeals misconstrued current law pertaining to claim preclusion. In addition, the Sixth Circuit denied Mitchell's ability to proceed against the individual Federal Agency supervisors based upon a tortured and convoluted interpretation of the clear language of the FMLA – an interpretation that drastically departs from the decisions reached in other Circuits throughout the country and ignores the mandate from this Court to adhere to the plain meaning of the statutes unless such adherence leads to an absurd result.

REASONS FOR GRANTING THE WRIT

I. *THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CREATES A SPLIT IN THE CIRCUITS.*

A. FEDERAL AGENCY SUPERVISORS ARE SUBJECT TO INDIVIDUAL LIABILITY UNDER THE FMLA REGULATIONS

The lower courts erroneously engaged in a convoluted exercise of statutory construction to hold that Federal agencies are not bound by the Regulations pertaining to the individual liability for actions taken by individual defendant employees which violate the FMLA. In rejecting the well-reasoned position adopted by the Eighth Circuit Court of Appeals, in *Darby v. Bratch*, 287 F.3d 673 (8th Cir. 2002)(in which the *Darby* court held that public supervisors ***are*** liable under the FMLA), and the heavily-criticized position previously taken by the Eleventh Circuit, in *Wascura v. Carver*, 169 F.3d 683, 686 (11th Cir. 1999)(a decision which relied upon a previous Eleventh Circuit decision rejecting individual liability in the Fair Labor Standards Act and declaring that it was bound by prior precedent), the Sixth Circuit Court of Appeals stated:

> Notwithstanding the guidance from these decisions, we respectfully note that neither *Darby* nor *Wascura* attempt a textual analysis of the FMLA. The court in *Darby* limited its reasoning to the general proposition that public and private employers should not be treated separately under the statute. *See Darby*, 287 F.3d 681. The *Wascura* court concluded that it was constrained by a prior decision of that court that did not extend individual liability under the FLSA to public agency employers. *See Wascura*, 169 F.3d at 686 (citing *Welch v. Laney,* 57 F.3d 1004 (11th Cir. 1995)).*** Similarly, the district courts have resolved the issue with conflicting results. Our independent examination of the FMLA's text and structure reveals that the statute does not impose individual liability on

public agency employers.

Appx. 30a. [Citations omitted.] The Sixth Circuit asserts that its conclusion is based, in part, upon the "Court's lack of precedent to the contrary." Appx. 37a. However, the Sixth Circuit specifically rejected the following rationale in *Darby*:

> It seems to us that the ***plain language*** of the statute decides this question [of individual liability for public officials under the FMLA]. Employer is defined as "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer[.]" 29 U.S.C. § 2611(4)(A)(ii)(I). This language ***plainly*** includes persons other than the employer itself. ***We see no reason to distinguish employers in the public sector from those in the private sector.*** *See Morrow [v. Putnam*, 142 F.Supp.2d 1271 (D.Nev. 2001)], at 1275 (stating that opinions which hold public officials are not subject to individual liability "do not explain why public officials should be exempted from liability while managers in the private sector are not.") If an individual meets the definition of employer as defined by the FMLA, then that person should be subject to liability in his individual capacity.

Darby, supra at 681. [Emphasis added.] The logic of *Darby* has been consistently adopted throughout the country, by court after court – until the decision rendered hereinbelow.

In rejecting *Darby*, the Court of Appeals for the Sixth Circuit disavowed the prevailing view throughout the country that federal supervisors, like all other supervisors, are individually liable for violations of FMLA. In fact, this issue has been addressed throughout the district court level, with the vast majority of those courts adopting the same well-reasoned rationale espoused by the Eighth Circuit in *Darby, supra. See, e.g., Keene v. Rinaldi*, 127 F.Supp.2d 770, 778 (M.D.N.C.

2000)("it appears that a majority have found individual liability [for public supervisors]"); *Kilvitis v. County of Luzerne*, 52 F.Supp.2d 403, 412-13 (M.D.Pa. 1999)(same); *Carter v. USPS*, 157 F.Supp.2d 726, 728 (W.D.Ky. 2001)("[a]s modified by clause (A)(ii)(I) and (A)(iii), an "employer" includes both individuals and public agencies and therefore also includes individuals in public agencies. ***Common logic and standard rules of grammar permit no other reading***"); *Johnson v. Fayette County*, 271 F.Supp.2d 1068 (W.D.Tn. 2003)("[t]he Court finds no rational basis to exempt [the] public sector [] from similar liability, where the language of the FMLA clearly expresses an intent to subject individuals to joint and several liability with their employers....a finding that public officials may be liable only in their official capacities would eviscerate the significance of Congress's clearly expressed intent to hold public officials individually liable"); *Morrow v. Putnam*, 142 F.Supp.2d 1271, 1272-73 (D.Nev. 2001)(A plain reading of the statute that supervisory government employees may be considered employers under the FMLA); *Meara v. Bennett*, 27 F.Supp.2d 288, 291 (D.Mass. 1998)("This language clearly suggests that individuals <u>are</u> contemplated as defendants....").

As stated by this Court as early as 1850, in analyzing Congressional intent, the plain meaning of the statute dictates unless such analysis leads to an absurd result. In *U.S. v. Boisdore's Heirs*, 49 U.S. 113, 122 (1850), this Court held that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." The first step in resolving statutory construction questions "'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)(internal citations omitted). In fact, where the language of the statute cannot express more than one meaning, "'***the duty of interpretation does not arise.***'" *Baum v. Madigan*, 979 F.2d

438 (6th Cir. 1992)(emphasis added). *See also United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 240-41 (1989).

Where a lower court had ignored the plain meaning of a statute based upon punctuation selected by Congress, this Court held, in *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of America*, 113 S.Ct. 2173, 2183 (1993)(emphasis added):

> [A] purported plain-meaning analysis based only on punctuation is necessarily incomplete and ***runs the risk of distorting a statute's true meaning***. Along with punctuation, text consists of words living "a communal existence," in Judge Learned Hand's phrase, the meaning of each word informing the others and "all in their aggregate tak[ing] their purport from the setting in which they are used." *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2nd Cir. 1941).... Statutory construction "is a holistic endeavor," *United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 630, 98 L.Ed.2d 740 (1988), and, at a minimum, must account for a statute's full text, ***language as well as punctuation, structure, and subject matter***.

Contrary to these guidelines, both of the lower courts in the case at bar conducted a strained analysis of the internal syntax of the underlying statute to reach a conclusion that while a pubic agency is included as an employer under the FMLA, and while the definition of an employer specifically includes individuals acting on behalf of the employer, the statute somehow precludes individuals working on behalf of an employer when the employer happens to be a public agency, relying principally upon Congress's choice of an "em dash" versus some other form of punctuation.

In fact, the Sixth Circuit ignored the long-standing directive of this Court to ***avoid*** engaging in statutory construction when the statute provides a clear meaning, and chose instead to conduct an excruciatingly strained analysis of

the internal syntax of the underlying statute – actually addressing the "import" of an "em-dash" (and the presence or absence thereof) to reject the holdings of the clear majority, including the Eighth Circuit Court of Appeals decision in *Darby v. Bratch*, *supra*. As a result, the Sixth Circuit currently stands as the ***only*** Court to have undertaken a hyper-technical, line-by-line, super analysis of the punctuation and enumeration of the internal structure of the FMLA statute as justification for ignoring the clear language of the statute that establishes supervisor liability for ***both*** private and public supervisors under the FMLA as has been found by the overwhelming majority of courts that have addressed this specific issue.

The Court of Appeals's decision is contrary to the Congressional purpose. It rejects the well reasoned decision of the Eighth Circuit, as well as the rationale espoused by the Eleventh Circuit. There is no logical way to reconcile the split of authority between the Sixth Circuit and the other circuits. This issue of individual liability for public supervisors under the FMLA is very significant. As a result of this decision, public agency employees working within the Sixth Circuit have far less protection against wrongdoing than do public agency employees in the rest of the country, and *certiorari* should be issued so as to manifestly establish the applicability of the FMLA to public agency employers.

II. THE SIXTH CIRCUIT ERRED IN HOLDING THAT A DISMISSAL BASED SOLELY ON A JURISDICTIONAL BAR RESULTS IN CLAIM PRECLUSION FOR SUBSEQUENT UNRELATED CLAIMS.

As established by this Court in *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984), claim preclusion "refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." *Id.* at 77, n.1. Claim preclusion only arises in the presence of the

following four elements: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action. *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1994).

In applying the above-referenced elements to the underlying matter, the Court of Appeals erred by holding that the dismissal of Mitchell's previous action based solely upon a jurisdictional bar to the proceedings, i.e., his failure to see a Federal Agency EEO Counselor within 45 days of the incident, was a decision "on the merits" which precluded any subsequent unrelated claims against the USPS. Such an outcome is in stark contrast to decisions rendered both by this Court as well as by other Circuit Courts wherein the failure to comply with a precondition requisite to the Court's going forward did not bar subsequent claims.

This Court addressed a dismissal based upon a failure to meet a condition precedent in *Costello v. U.S.*, 81 S.Ct. 534, 544-45 (1961) (emphasis added), and concluded:

> We hold that a dismissal for failure to file the affidavit of good cause is a dismissal 'for lack of jurisdiction, within the meaning of the exception under Rule 41(b).... We regard the exception [to dismissals being "on the merits"] as encompassing those dismissals ***which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward*** to determine the merits of his substantive claim. *** In *Haldeman v. United States*, 91 U.S. 584, 585-586, 23 L.Ed. 433, which concerned a voluntary nonsuit, this Court said, "there must be at least one decision on a right between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar

> to a subsequent suit. * * * ***There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively.***" *** In *Hughes v. United States*, 4 Wall. 232, 237, 18 L.Ed. 303, it was said: *** If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

Likewise, the Fifth Circuit applied the same rationale to a claim arising under the EEOC in *Truvillion v. King's Daughters Hospital*, 614 F.2d 520, 524 (5th Cir.1980)(emphasis added) and held:

> Contrary to the district court's view, there was no judgment on the merits in Suit I. The requirements of E.E.O.C.'s notice to the respondent and a good faith investigation by the E.E.O.C. in a loose sense might be treated as jurisdictional. ***They are, however, nothing more than procedural prerequisites to the court's determination of the substantive issues. They do not touch the merits.***

Relying upon this Court's ruling in *Costello, supra*, as well as upon *Stebbins v. Nationwide Mutual Ins. Co.*, 528 F.2d 934, 937 (4th Cir. 1975), *cert. denied*, 1976, 424 U.S. 946; *Stebbins v. Keystone Insurance Co.*, 481 F.2d 501 (D.C.Cir.1973); *Tademy v. Scott*, 157 F.2d 826, 828 (5th Cir. 1946); *Wright & Miller*, Federal Practice § 2373, pp. 234-239 (1971), the *Truvillion* court concluded, "***Because a dismissal for failure to meet a condition for filing suit does not 'operate as an adjudication upon the merits', it cannot bar a subsequent suit between the parties.***" *Truvillion*, 614 F.2d at 524. [Emphasis added.] *See also Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 at fn 4 (2nd Cir. 1994)("a dismissal for want of subject matter or personal jurisdiction is not a decision on the merits. Consequently, upon such a dismissal the plaintiff is free

to institute the suit anew in a jurisdiction or under circumstances supporting jurisdiction"); 10 C. *Wright & A. Miller*, Federal Practice & Procedure § 2713; 81 Mich.L.R. 433, 449 (1982), Judicial Responses to the EEOC's Failure to Attempt Conciliation ("[i]f conciliation is a jurisdictional prerequisite, courts must dismiss for lack of jurisdiction suits that do not fulfill that prerequisite. A summary judgment order under these circumstances exceeds the trial court's authority, ***for without jurisdiction the court cannot adjudicate the merits***")(emphasis added; footnote omitted); 21A Fed. Proc. § 51:246 (2003)("[t]he courts are split over whether a dismissal for failure to satisfy a statute of limitations is considered an adjudication on the merits for purposes of claim [] preclusion").

In the case at bar, while the first action (*Mitchell I*) did result in an Order dismissing Mitchell's original claims, the district court in *Mitchell* I ***never*** addressed the merits of Mitchell's allegation that the USPS discrimination against him based upon his disability. In fact, the *Mitchell I* decision avoided any analysis of the ***facts*** pertaining to Mitchell's claims and definitively ruled that his ADA claims were ***barred as a matter of law*** due to his failure to timely contact a counselor.

The Sixth Circuit's decision applying claim preclusion is directly contrary to the holding of *Costello,* and is actually in direct conflict with a previous Sixth Circuit precedent. In *Wilkins v. Jakeway (II)*, 183 F.3d 528 (6th Cir. 1999), *superceding Wilkins v. Jakeway (I)*, 177 F.3d 560 (6th Cir. 1999), the Sixth Circuit previously reviewed the impact of a dismissal based upon a failure of condition precedent, stating:

> This panel is persuaded that the district court in the [first] suit did not reach the merits of the case. By determining that the individual Defendants were simply Wilkins's supervisors and not his "employers," the court essentially found that these Defendants, in their individual capacities, were not the proper parties to be named in the [first] suit. ***This simply***

> ***does not go to the actual merits of the case...*** Defendants rebut that the district court itself states that the dismissal was granted under 12(b)(6).... While this position is initially attractive, ***this panel just cannot ignore the practical reality that the merits of Wilkins's FCA claims against the individual Defendants just were not examined by the district court***. Despite what the court <u>said</u> about deciding the matter as a decision on the merits under 12(b)(6), what the court <u>did</u>, by determining that the individual Defendants were not "employers" pursuant to the FCA, was to effectively decline to reach the merits of Plaintiff's claims as to the individual Defendants.

Id. at 533. [Emphasis added; underline in orig.] Thus, just as in *Costello*, *supra*, and *Wilkins II*, *supra*, the district court herein never reached the ***<u>merits</u>*** of Mitchell's claim, i.e., whether the USPS discriminated against him in violation of Federal law. Instead, the district court simply dismissed the action based upon a lack of jurisdiction to hear Mitchell's claim due to a statutory defect in the complaint. Such a dismissal raises the very concern mentioned in *Costello*, *supra*, that such a dismissal is not a true decision "on the merits."

The Court of Appeals for the Sixth Circuit's decision, in relying upon a prior dismissal ***based upon a lack of jurisdiction to hear the previous matter*** is completely inappropriate, improperly denies Mitchell his "day in court," and allows the USPS to freely engage in illegal activity ***<u>not connected with a 45 day counseling condition precedent</u>*** to the first suit.

The Sixth Circuit decision is in direct contradiction to previous decisions rendered both by this Court and other Circuit Courts that have addressed the impact of a dismissal based upon a failure to meet a condition precedent as well as with previous Sixth Circuit precedent. The Supreme Court

should issue *certiorari* and bring the Sixth Circuit into compliance with the previous holding of this Court as well as the decisions rendered by the other Circuit Courts of Appeal.

CONCLUSION

WHEREFORE, Petitioner JOEY L. MITCHELL respectfully requests that this Court GRANT his Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in order to manifestly establish individual liability for public agency supervisors as set forth in the underlying statute, and to set forth the impact of a previous dismissal based upon a failure to meet a condition precedent on subsequent claims.

Respectfully submitted,

JAMES M. MORRIS
Counsel of Record
MORRIS & MORRIS, P.S.C.
217 North Upper St.
Lexington, KY 40588-0394
(859) 281-6981
Counsel for Petitioners

Dated: March 17, 2004

APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOEY L. MITCHELL,
Plaintiff-Appellant,
v.

GLENN CHAPMAN, et al.,
Defendants-Appellees.

No. 01-5571

Appeal from the United States District Court
Decided and Filed: September 11, 2003
No. 00-00179-Karl S. Forester, Chief District Judge
Argued Feb. 7, 2003
Decided and Filed Sept. 11, 2003
Before: GILMAN and GIBBONS, Circuit Judges;
ECONOMUS, District Judge*

COUNSEL

ARGUED: James M. Morris, MORRIS & MORRIS, Lexington, KY, for Appellant. Sharon Swingle, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE SECTION, Washington, DC, for Appellees.

ON BRIEF: James M. Morris, MORRIS & MORRIS, Lexington, Kentucky, for Appellant. Sharon Swingle,

---

* The Honorable Peter C. Economus, United States District Judge for the Northern District of Ohio, sitting by designation.

Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE SECTION, Washington, DC, for Appellees.

OPINION

PETER C. ECONOMUS, District Judge.

I. OVERVIEW

The Appellant, Joey L. Mitchell ("Appellant" or "Mitchell"), appeals the district court's grant of summary judgment to his employer, the United States Postal Service ("USPS"), and three USPS employees, in this action alleging various civil rights claims.

Mitchell advances three arguments on appeal: (1) the district court misapplied the doctrine of claim preclusion as a means to bar the claims alleged against the defendants in the defendants' official capacities; (2) the district court should have allowed his 42 U.S.C. § 1983 claims to proceed under the holding of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); and (3) the district court erred in interpreting the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§ 2601-2654 (1994), as to preclude individual liability claims asserted against federal agency supervisors.

For the reasons that follow, we **AFFIRM** the decision of the district court.

II. BACKGROUND

A. FACTUAL HISTORY

On July 8, 1995, Mitchell began his employ as a letter carrier at the United States Post Office located in Paris, Kentucky (the "Paris Facility"). (J.A., 23, 166.) Prior to and throughout his employment, Mitchell suffered from chronic neck pain arising

from an injury that he sustained while serving in the United States Navy. (J.A., 23, 54, 57-58,166.)

On November 11, 1996, Mitchell's treating physician, Dr. Ballard Wright ("Dr.Wright"), certified that Mitchell's neck pain was a chronic serious illness pursuant to the FMLA. (J.A., 24, 54, 59, 166.) Dr. Wright's certification indicated that the neck injury required Mitchell's occasional absence from work. (J.A., 24, 54, 59,166.)

On February 12, 1997, Mitchell submitted a formal request to the Paris Facility Postmaster, Richard A. Derrickson ("Derrickson"), requesting a transfer from his letter carrier position to the position of clerk. (J.A., 16- 17, 24, 77, 85.) Derrickson took no immediate action on the transfer request.

Several months later, on May 12, 1997, Mitchell failed to appear during his regularly scheduled shift. (J.A., 17, 24, 116.) When Mitchell returned to work the following day, his acting supervisor, Glenn Chapman ("Chapman"), verbally reprimanded Mitchell for the non-excused absence. (J.A., 17, 24, 116, 167.) Chapman indicated to Mitchell that poor attendance was a significant factor that could detrimentally impact Mitchell's transfer request. (J.A., 45, 116, 167.)

In response, Mitchell explained that his absence was the result of a re-injury to his neck that he sustained while carrying boxes of canned goods for a charity event. During the ensuing volatile discussion, Mitchell declared his intention to designate the absence as FMLA leave and referred to Dr. Wright's prior certification. (J.A., 24, 45, 167, 173.) Mitchell further informed Chapman that he would have to file for permanent disability if compelled to continue working as a letter carrier. (J.A., 40, 45, 116-17.) Ultimately, Mitchell designated the eight hours as unscheduled sick leave. (J.A., 24, 168.)

Chapman immediately alerted Derrickson to Mitchell's comments regarding the neck injury. (J.A., 77, 116-17.) In response to this information, Derrickson instructed Mitchell to

receive a medical fitness-for-duty examination ("FFD Exam")[1]. (J.A., 17, 24, 78-79, 117, 169.) Derrickson additionally transferred Mitchell from letter carrier to temporary clerk duties pending the results of the FFD Exam. (J.A., 24, 78, 117, 167-68.)

On May 15, 1997, Mitchell provided to Derrickson a letter from Dr. Wright indicating that he was "medically cleared to perform his duties as a letter carrier for the U.S. Postal Service with no restrictions." (J.A., 12, 17, 24, 54, 60, 78-79, 93, 168.) Dr. Wright's letter further indicated that, "if a less physically strenuous position becomes available ... [Mitchell should] be considered for such a position so as to not exacerbate his head and neck pain." (J.A., 54, 60, 93.) Derrickson refused to return Mitchell to the letter carrier position pending the results of the FFD Exam. (J.A., 24, 79, 168.)

On May 20, Mitchell's collective bargaining representative, the National Association of Letter Carriers, AFL-CIO (the "Union"), filed a grievance (the "Grievance") on Mitchell's behalf. The Grievance alleged violations of the FMLA and parallel provisions of the collective bargaining agreement (the "CBA") entered into between the Union and the USPS. (J.A., 17, 160, 169.)

On May 23, 1997, Dr. Robert Davenport ("Dr.Davenport"), a physician under contract with the USPS, conducted a FFD Exam of Mitchell. (J.A., 13, 17, 24- 25, 40, 45, 54, 61-66, 79, 169.) Dr. Davenport rendered three determinations regarding Mitchell's condition: (1) Mitchell maintained the ability to perform letter carrier duties so long as he refrained from carrying mail with a satchel; (2) Mitchell could continue to perform clerk duties and maintain a low risk for injury; and (3) Mitchell should be referred to a neurosurgeon, Dr. John Gilbert

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[1]Postal regulations permitted management to order FFD Exams by a physician selected by the USPS "at any time and repeat as necessary, to safeguard the employee." (J.A., 78, 89-92.)

("Dr.Gilbert"), for further evaluation. (J.A., 25, 54, 66.)

That same day, the USPS denied the Grievance. (J.A., 160.) Pursuant to the CBA, the Union initiated Step 2 of the grievance procedure requesting that the USPS award Mitchell backpay, sick/annual leave, and reinstatement to letter carrier duties. (J.A., 13, 161.)

By letter dated June 9, 1997, the USPS denied the requested relief stating, "In the interest of the Grievant's health and safety, Management has taken [Mitchell] out of the situation causing him physical problems, pending further evaluation. Therefore in the absence of any contractual violation, the grievance is denied." (J.A., 161.) The Union thereafter initiated Step 3 of the grievance procedure. (J.A., 13, 162-64.)

A third physician, Dr. Gilbert, examined Mitchell on June 30, 1997 and issued a report returning Mitchell to work duty without restrictions. (J.A., 13, 17, 25, 69, 169.) Subsequently, Naewana Nickles ("Nickles"), a USPS Occupational Health Nurse Administrator responsible for reviewing medical evaluations of USPS employees, received Dr. Gilbert's report. (J.A., 13, 25, 55.) Nickles found the report deficient in several respects and requested that Dr. Gilbert specifically address whether Mitchell could perform "all of the essential functions of a City Carrier without risk of hazard to self or others." (J.A., 13, 18, 25, 55, 70-71, 169-71.)

Dr. Gilbert responded to Nickles's request as follows:

> [B]ased on my exam and discussion with the patient and the fact that the patient tells me that he feels he can do his job without restrictions, I feel this [sic] is not unreasonable for him to perform his job without restrictions. If the [USPS] would like a more detailed assessment of restrictions, ... we would need to proceed with a functional capacity evaluation done by a licensed physical therapist.
>
> I note in your records that [Mitchell] has said that the stresses from carrying a satchel cause him problems on his

> neck. If this is indeed true, then I would recommend that he not carry the satchel. However, the patient did not tell me this. He told me he felt he could do his job without restrictions. If you want to be on the safe side and if it is true that the patient feels that the satchel's giving him problems, then we need to get rid of the satchel.

(J.A., 25, 55, 72.)

Nickles ultimately reported to Derrickson that Mitchell "[c]ould continu[e] carrying mail if [Mitchell] doesn't use [a] satchel." (J.A., 55, 74, 79.) Derrickson did not, however, return Mitchell to full letter carrier duties. (J.A., 79.)

On August 11, 1997, Mitchell submitted a second request for transfer to a full-time clerk position. (J.A., 13, 18, 25, 80, 95.) Derrickson approved the request on August 19, 1997. (J.A., 13, 25, 80, 95.)

On August 25, 1997, Dr. Gilbert issued a supplemental report to the USPS indicating that Mitchell "can't work with a neck harness because it puts him at a high risk" for injury. (J.A., 55, 75.) Dr. Gilbert further indicated that he examined a model USPS waist harness for carrying mail that "transfers the weight from the bag from the shoulder to the waist" and that Mitchell was at a "low risk" of injury while using the waist harness. (J.A., 13-14, 55, 75.) Consequently, Dr. Gilbert "recommended releasing Mr. Mitchell to full duty restricted to using the harness provided to [him] by the [USPS] which transfers the weight of the bag to the waist rather than the shoulder." (J.A., 13-14, 55, 75.)

Mitchell alleges that he attempted to withdraw his transfer request based on Dr. Gilbert's recommendation--however, Derrickson refused the withdrawal. (J.A., 174-75.) Derrickson denies that Mitchell submitted such a request. (J.A., 80.) Mitchell's transfer to the clerk position became effective August 30, 1997. (J.A., 14, 25, 80, 96.)

B. PROCEDURAL HISTORY

The EEO Proceedings

Mitchell contacted an Equal Employment Opportunity ("EEO") counselor on October 30, 1997 alleging that Derrickson's refusal to return him to his letter carrier position constituted disability discrimination in violation of the FMLA and the Disabled Veterans Act.[2] (J.A., 11, 14, 25, 40, 42-46.) On June 6, 1998, Mitchell filed a formal EEO complaint of discrimination ("EEO Complaint") with the USPS alleging disability discrimination "based on accommodation."[3] (J.A.,

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[2] Title twenty-nine of the Code of Federal Regulations, chapter fourteen, part 1614, establishes an extensive dispute resolution process to address a federal employee's charge of discrimination. This dispute resolution system requires "a complaining party to pursue administrative relief prior to court action, thereby encouraging more expedient, less formal, and less expensive resolution of disputes within the Federal Government and outside of court." West v. Gibson, 527 U.S. 212, 218-19, 119 S.Ct. 1906, 144 L.Ed.2d 196 (1999). In particular, 29 C.F.R. § 1614.105 provides, in relevant part:

> (a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.
>
> (1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.
>
> (2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

29 C.F.R. § 1614.105 (2003).

[3] Twenty-nine C.F.R. § 1614.106 provides, in pertinent part:

> (a) A complaint must be filed with the agency that allegedly discriminated against the complainant.

12, 14, 26, 41, 47.)

The USPS dismissed as untimely Mitchell's EEO Complaint, determining that Mitchell initiated contact with an EEO counselor beyond the forty-five day period provided in 29 C.F.R. 1614.105. (J.A., 12, 26, 45, 48-51.) Specifically, the USPS determined that Mitchell had not consulted with the EEO counselor until sixty-six days after the alleged discriminatory refusal to reinstate him as a mail carrier, and sixty days after the effective date of his transfer to a clerk position. (J.A., 45, 48-51.) Mitchell did not administratively appeal the USPS's decision.

Mitchell I

On November 17, 1998, Mitchell filed a complaint in the United States District Court for the Eastern District of Kentucky against the USPS and the Postmaster General, William Henderson ("Henderson"), alleging violations of the Rehabilitation Act of 1973, 29 U.S.C. §§ 700-796 (1994), and the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101- 12213 (1994). *See Mitchell v. Henderson* ("*Mitchell I*"), No. 98-469 (E.D. Ky. filed Nov. 1, 1998), at (J.A., 97-104). Mitchell's complaint sought relief predicated on two events: (1) the defendants' purported refusal of his request to return to letter carrier duties with the accommodation of a waist harness; and (2) his transfer to a lesser-paying clerk's position after requesting FMLA leave. *Mitchell I*, at (J.A., 97-104).

The district court granted summary judgment in favor of the defendants, resting its determination on Mitchell's failure to contact an EEO Counselor within forty-five days of the allegedly discriminatory conduct. (J.A., 106- 12.)

Resolution of the Grievance

(b) A complaint must be filed within 15 days of receipt of the notice required by § 1614.105(d), (e) or (f) [provisions regarding the completion of informal meetings with an EEO counselor].

Several weeks later, on May 25, 1999, the Union and the USPS settled Mitchell's Step 3 Grievance. (J.A., 165.) The terms of the settlement awarded Mitchell backpay during the period that he served as a temporary clerk, as well as additional sick/vacation leave. (J.A., 165.)

Mitchell II

Nearly a year later, Mitchell filed a complaint in the United States District Court for the Eastern District of Kentucky against the USPS, Henderson, Chapman, Derrickson, and Nickles, where he re-asserted violations of the Rehabilitation Act and the ADA, as well as alleged additional claims pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 ("Title VII"), 42 U.S.C. §§ 2000a-2000h (1994); the FMLA; 42 U.S.C. § 1983; the Fourteenth Amendment to the United States Constitution; and the Kentucky Civil Rights Act ("KCRA"), Ky.Rev.Stat. Ann. §§ 344.010-.990. *See Mitchell v. Chapman (Mitchell II)*, No. 00-179 (E.D. Ky. filed May 15, 2000), at (J.A., 6-22).

The defendants thereafter moved for the dismissal of the complaint pursuant to Fed.R.Civ.P. 12(b)(1), (2), (3), and (6), or in the alternative, for summary judgment pursuant to Fed.R.Civ.P. 56(b).[4] In response, Mitchell conceded that dismissal was proper as to all claims asserted against Henderson and all ADA claims. (J.A., 138-39, 143, 149.) The

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[4]Rule 12 of the Federal Rules of Civil Procedure provides, in pertinent part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief may be granted, matters outside of the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provide in Rule 56.

Fed.R.Civ.P. 12(b)(6). As the district court considered a series of affidavits and exhibits attached to the motion, it converted the motion to one seeking summary judgment.

district court accordingly granted judgment in favor of the defendants on the conceded claims. (J.A., 28.)

The district court further determined that the doctrine of claim preclusion rendered its decision in *Mitchell I* as a bar to Mitchell's subsequent claims against the USPS, and all claims asserted against Chapman, Derrickson, and Nickles in their official capacities. (J.A., 29-34.) The district court declined, however, to invoke claim preclusion as to Mitchell's individual capacity claims. (J.A., 30-32.)

The district court then considered the individual liability of Chapman, Derrickson, and Nickles. The district court concluded that neither Title VII, the Rehabilitation Act, nor Kentucky law imposed individual liability for discriminatory conduct. (J.A., 35-36.) Consequently, the district court entered judgment in favor of the defendants on said claims.

The district court also awarded judgment to the defendants on Mitchell's individual capacity FMLA claims. In so doing, the district court rejected Mitchell's contention that the statute imposed individual liability on public employers. (J.A., 36-37.)

The district court further awarded judgment to the defendants on Mitchell's Section 1983 claims, reasoning: (1) federal employees do not act "under color of state law" as required by the statute; and (2) Mitchell failed to comply with the one-year statute of limitations for asserting Section 1983 claims. (J.A., 34-35.) Moreover, the district court held that the Fourteenth Amendment was inapplicable to claims arising from actions of federal officials and employees. (J.A., 35.)

Accordingly, the district court granted the defendants' motion for summary judgment. The instant appeal ensued. (J.A., 39.)

III. STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. *See Brooks v. American Broadcasting Cos.*, 932 F.2d 495, 500 (6th Cir.1991). Summary judgment is proper "if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When confronted with a properly supported motion for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. A genuine issue for trial exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

IV. LAW AND ANALYSIS

A. Claim Preclusion

Mitchell challenges the district court's determination that the principles of claim preclusion, or res judicata, [5] rendered the judgment in *Mitchell I* as a bar to *Mitchell II*. This Court reviews the dismissal of a case on claim preclusion grounds de novo. *See Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir.1995) (citing *Black v. Ryder/PIE Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir.1994)).

Claim preclusion is the doctrine by which a final judgment on the merits in an action precludes a party from bringing a subsequent lawsuit on the same claim or raising a new defense to defeat a prior judgment. *See Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). It

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[5] In *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), the United States Supreme Court expressed its preference for the use of the term "claim preclusion," rather than the more traditionally utilized term "res judicata." *Migra*, 465 U.S. at 77 n. 1, 104 S.Ct. 892. Res judicata generally includes two separate concepts--claim preclusion and issue preclusion. Claim preclusion, or true res judicata, refers to effect of a prior judgment in foreclosing a subsequent *claim* that has never been litigated, because of a determination that it should have been advanced in an earlier action. *Id.* Issue preclusion, on the other hand, refers to the foreclosure of an issue previously litigated. *Id.*

precludes not only relitigating a claim previously adjudicated; it also precludes litigating a claim or defense that should have been raised, but was not, in the prior suit. *See Stern v. Mascio*, 262 F.3d 600, 608 (6th Cir.2001) (citing *Gargallo v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 918 F.2d 658, 660-61 (6th Cir.1990)). Claim preclusion only arises, however, in the presence of the following four elements: (1) where the prior decision was a final decision on the merits; (2) where the present action is between the same parties or their privies as those to the prior action; (3) where the claim in a present action should have been litigated in the prior action; and (4) where an identity exists between the prior and present actions. *See Kane*, 71 F.3d at 560.

Here, the central dispute involves the first three elements of claim preclusion--whether there was a final decision on the merits, whether the two actions were filed against the same parties or their privies, and whether the claims in *Mitchell II* should have been brought in *Mitchell I*.[6] The Court shall address each element in turn.

1. Decision on the Merits

The district court determined that its judgment in *Mitchell I* resting on Mitchell's failure to fulfill a condition precedent to suit--specifically, Mitchell's failure to pursue informal resolution with an EEO counselor within forty-five days of an alleged discriminatory act--constituted a decision on the merits for claim preclusion purposes. In reaching this conclusion, the district court acknowledged the lack of precedent from this Court regarding whether a dismissal for failing to fulfill a

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[6]Mitchell concedes the fourth element--whether there is an identity between the claims asserted in *Mitchell I* and *Mitchell II*. Identity of causes of action means an "identity of the facts creating the right of action and of the evidence necessary to sustain each action." *Westwood Chem. Co. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir.1981). It is undisputed that the complaints in *Mitchell I* and *Mitchell II* allege identical facts, differing only in the introductory paragraphs.

condition precedent is a decision on the merits.[7] (J.A., 29.) In the absence of controlling authority, the district court reasoned: (1) the deadline for consulting with an EEO counselor was similar to a statute of limitations; [8](2) a dismissal on statute of limitations grounds was an adjudication on the merits for claim preclusion purposes;[9] and (3) a dismissal of plaintiff's claims for failure to contact an EEO counselor therefore was a final decision on the merits for claim preclusion purposes. (J.A., 29-30.)

The district court's analysis rests on sound legal authority. It is well-established that a party's exhaustion of administrative processes for filing a claim of discrimination is a condition precedent to filing suit in the district court, rather than a jurisdictional prerequisite. *See Zipes v. Trans World Airlines*, Inc., 455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) (holding that the administrative provisions requiring an employee to pursue a charge of discrimination with the EEOC are conditions precedent to suit subject to waiver, tolling and estoppel); *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (extending *Zipes* to administrative requirements for federal employees bringing suits against federal agencies). This Court has held that a federal employee's administrative obligation to consult with an EEO counselor within a particular time period is a precondition to filing suit subject to equitable tolling, waiver and estoppel. *See Boddy*, 821 F.2d at 350 (citing *Zipes*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234). The distinction between a jurisdictional prerequisite and a condition precedent is of

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[7]*See Rivers v. Barberton Bd. of Educ.*, 143 F.3d 1029, 1032 (6th Cir.1998) ("Rivers urges that a dismissal for failure to satisfy a condition precedent should not be considered an adjudication on the merits for claim preclusion purposes ... [W]e need not decide this question today.").

[8]Citing *Boddy v. Dean*, 821 F.2d 346, 350 (6th Cir.1987).

[9]Citing *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir.1978).

significant analytical import because a dismissal for lack of subject matter jurisdiction is not a dismissal on the merits for claim preclusion purposes. *See Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 916 (6th Cir.1986) ("Normally, Rule 12(b)(6) judgments are dismissals on the merits and Rule 12(b)(1) dismissals are not.") (Citation omitted).

It further is well-established that conditions precedent are similar to statutes of limitations. *See Truitt v. County of Wayne*, 148 F.3d 644, 646- 47 (6th Cir.1998) ("[W]e hold that [an administrative condition precedent requiring a plaintiff to file suit within ninety days of receiving a right to sue letter from the EEOC] is not a jurisdictional requirement but, instead, is a timing requirement similar to a statute of limitations, subject to waiver, estoppel and equitable tolling."). Moreover, a dismissal for failing to comply with a statute of limitations is a decision on the merits for claim preclusion purposes. *See Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir.1981). Therefore, the district court did not make an impermissible leap in analogizing a dismissal for failing to fulfill a condition precedent to a dismissal arising from a failure to comply with the statute of limitations.

The limitations of the district court's approach

While the district court reached the correct conclusion--that is, a dismissal predicated on a federal employee's failure to consult with an EEO counselor within forty-five days is a decision on the merits for claim preclusion purposes--the accuracy of district court's rationale requires further explanation. The specific condition precedent addressed by the district court is readily akin to dismissal for failing to comply with a statute of limitations. In either context, whether the plaintiff fails to consult with the EEO counselor within forty-five days of the discriminatory event, or whether the plaintiff fails to file suit within the statutorily prescribed period, the party is permanently foreclosed from meeting the condition or statutory requirement. Simply, the party is unable to rewind the clock, fulfill the condition/file the action within the requisite

time period, and proceed to an adjudication of his or her claim. However, there are certain condition precedents where, although the party may not have fulfilled the condition prior to filing suit in the district court, he or she may return to the administrative process, fulfill the condition, and re-file the civil action.[10] Therefore, not all decisions finding that a plaintiff failed to fulfill a condition precedent are readily comparable to a finding that a party failed to comply with the statute of limitations.

It is the potential overreaching of the district court's reasoning that warrants an express limitation. This Court repeatedly has cautioned that a decision on the merits is one that signifies the "death knell" of the litigation. *See Wilkins v. Jakeway*, 183 F.3d 528, 534 (6th Cir.1999) ("[T]his is a death knell for Plaintiff's [False Claims Act] claims against the Defendants, in their individual capacities, and is essentially a decision on the merits."); *Rogers*, 798 F.2d at 916 ("Where a statutory right is being pursued, however, and the defense raised is that the plaintiff or defendant does not come within the purview of the statute, the judicial acceptance of this defense,

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[10]For example, 29 C.F.R. § 1614.407(a) requires an aggrieved party to file suit within ninety days of receiving notice of the EEOC's final action or dismissal of a complaint. When the administrative process is complete, the EEOC issues to the aggrieved party a "right to sue letter" and the party thereafter has ninety days in which to file a civil action. *See* 29 C.F.R. § 1614.109. Where the plaintiff files suit prior to receiving the right to sue letter, the district court is compelled to dismiss the premature action for failure to exhaust administrative remedies. *See Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560 (6th Cir.2000). It is well-settled that the ninety day right to sue provision is an administrative condition precedent, rather than a jurisdictional prerequisite. *See Truitt*, 148 F.3d at 646-47. Consequently, the court should dismiss the action pursuant to Rule 12(b)(6), for failure to state a claim, rather than Rule 12(b)(1), for lack of subject matter jurisdiction. Under the district court's analysis, such a dismissal would be on the merits for claim preclusion purposes, notwithstanding the aggrieved party's ability to return to the administrative process, await a right to sue letter, and subsequently re- file the action.

... is the death knell of the litigation and has the same effect as a dismissal on the merits."). The underlying principle of this "death knell" language is that a dismissal on the merits is one that permanently forecloses a party from further advancing a claim or defense.

Here, the district court's determination that Mitchell failed to meet with an EEO counselor within the requisite time period permanently foreclosed Mitchell's Rehabilitation Act claim. Mitchell could not, and will forever remain unable, to meet with an EEO counselor within forty-five days of the discriminatory act as required by 29 C.F.R. § 1614.105. However, not all dismissals for failing to meet a condition precedent will have this permanently barring effect. Therefore, a dismissal for failing to meet a condition precedent is a decision on the merits only if the aggrieved party is permanently foreclosed from fulfilling the condition. As Mitchell was permanently foreclosed from fulfilling the requirements of 29 C.F.R. § 1614.105, the district court correctly determined that its decision in *Mitchell I* was a decision on the merits.

Mitchell nevertheless asserts that as the judgment in *Mitchell I* was not one on the merits because the district court relied on a "technicality" (Final Br. of Appellant, at 14) and, or, a "procedural defect" (Final Br. of Appellant, at 15). In support of his contention, Mitchell relies on *Wilkins*, 183 F.3d 528, where a prior panel of this Court stated: "[A]lthough the district court's dismissal was framed in terms of a Rule 12(b)(6) dismissal on the merits, in actuality, the court's determination that the individual defendants were not 'employers' under the [False Claims Act] was jurisdictional because it did not go to the merits of Plaintiff's suit." *Wilkins*, 183 F.3d at 534.

Mitchell erroneously interprets the foregoing statements as requiring a judgment to reach the merits of a particular claim in order to have a preclusive effect. The patent deficiency in Mitchell's assertion, as demonstrated *supra*, is that dismissals for failing to comply with "technicalities" such as a statute of

limitations constitute decisions on the merits. Moreover, Mitchell misplaces his reliance on *Wilkins* as there the Court addressed the preclusive effect of a judgment in the context of a party's failure to establish a jurisdictional prerequisite. In contrast, *Mitchell I* addressed a failure to fulfill a condition precedent. As discussed *supra*, there is a significant distinction between a dismissal for a failure to fulfill a jurisdictional prerequisite and a dismissal for a failure to fulfill a condition precedent. As such, *Wilkins* is inapposite to the matter *sub judice*.

The instant appeal falls squarely within this Court's precedent establishing that a decision on the merits is one that permanently forecloses a party from advancing a claim or defense. As *Mitchell I* permanently foreclosed Mitchell from asserting claims pursuant to the Rehabilitation Act as a result of Mitchell's failure to meet with an EEOC counselor during the requisite period, the dismissal was a decision on the merits for claim preclusion purposes.

2. Same Parties or Privies

The second element of claim preclusion operates to bar successive claims among the same parties or their privies. The district court expressly determined that its decision in *Mitchell I* barred all claims against the USPS because the USPS was a named party to the prior action. (J.A., 30-31.) Similarly, the district court determined that its judgment in *Mitchell I* barred all claims alleged against Chapman, Derrickson, and Nickles in their official capacities because a suit against a public employee in his or her official capacity is a suit against the agency itself. (J.A., 30-31); *see also Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); *Monell v. Dep't. of Social Servs.*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Neither party disputes the district court's determinations in these respects.

The Appellees' attempt to extend claim preclusion to Mitchell's individual capacity claims

The Appellees nevertheless urge this Court to extend the

preclusive effect of *Mitchell I* to the individual capacity claims asserted against Chapman, Derrickson, and Nickles. (Final Br. of Appellees, at 23-31.) In support of their contention, the Appellees initially assert that the district court erred in construing the complaint in *Mitchell II* as alleging individual capacity claims. (J.A., 27-30.)

In *Moore v. City of Harriman*, 272 F.3d 769 (6th Cir.2001), this Court stated "while it is clearly preferable that plaintiffs explicitly state whether a defendant is sued in his or her 'individual capacity,' failure to do so is not fatal if the course of proceedings otherwise indicates that the defendant received sufficient notice." *Id.* (Internal citation and quotation marks omitted). *Harriman's* "course of the proceedings" test examines "the nature of the plaintiff's claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims of qualified immunity, to determine whether the defendant had actual knowledge of the potential for individual liability." *Harriman,* 272 F.3d at 772 n. 1 (citations omitted).

The Appellees acknowledge that the caption of the complaint identifies Chapman, Derrickson, and Nickles as subject to suit in their official and individual capacities. (J.A., 27-30.) The Appellees contend, however, that the allegations of the complaint demonstrate that all of the alleged conduct committed by Chapman, Derrickson, and Nickles occurred while the defendants acted in their official capacities as postal service employees. (J.A., 27- 30.) Consequently, the Appellees argue that this "official conduct" cannot give rise to individual liability claims.

In *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991), the United States Supreme Court rejected the argument advanced by the Appellees that "officials may not be held liable in their personal capacity for actions they take in their official capacity." *Hafer*, 502 U.S. at 27, 112 S.Ct. 358. The Court reasoned that such a theory "would absolutely

immunize state officials from personal liability for acts within their authority and necessary to fulfilling governmental responsibilities." *Hafer*, 502 U.S. at 28, 112 S.Ct. 358. The Court further reasoned that such absolute immunity extends only to a very limited class of officials, "including the President of the United States, legislators carrying out their legislative functions, and judges carrying out their judicial functions." *Hafer*, 502 U.S. at 28, 112 S.Ct. 358. As most public employees, including the Appellees, do not fall into this narrow class of officials, acts taken in the course of their official duties may serve as the basis for individual liability claims.[11] Therefore, the Appellees' argument is without merit.

The Appellees alternatively assert that the judgment in *Mitchell I* precludes the individual capacity claims because Chapman, Derrickson, and Nickles were in privity with the USPS. (J.A., 22-27.) In the context of claim preclusion, "privity ... means a successor in interest to the party, one who controlled the earlier action, or one whose interests were adequately represented." *Sanders Confectionery Prods., Inc. v. Heller*, 973 F.2d 474, 481 (6th Cir.1992). The Appellees fail to acknowledge, however, that the rule of differing capacities provides that "[a] party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity." RESTATEMENT SECOND OF JUDGMENTS § 36(2) (1982). The rule of differing capacities generally operates to allow a subsequent individual capacity suit against a governmental official even where a prior suit alleged an official capacity claim against the same official.

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[11]In addition, the unique waiver of sovereign immunity applicable to actions against the USPS allows for official capacity claims against USPS employees. *See* 39 U.S.C. § 401 ("The Postal Service shall have the following general powers--(1) to sue and be sued in its official name."). Therefore, USPS employees are not cloaked with absolute immunity for their actions.

See Wilkins, 183 F.3d at 534-35 (recognizing the distinction between individual and official capacity claims and applying the rule of differing capacities--albeit without explicitly referring to the rule); *see also Warnock v. Pecos County*, 116 F.3d 776 (5th Cir.1997) (holding that a prior suit against a municipality does not bar a later suit against local officials in their individual capacity); *Conner v. Reinhard*, 847 F.2d 384, 395 (7th Cir.) (holding that a prior suit against a municipality does not bar a subsequent suit against officials individually because official capacity and personal capacity suits involve different legal theories and defenses), *cert. denied*, 488 U.S. 856, 109 S.Ct. 147, 102 L.Ed.2d 118 (1988); *Headley v. Bacon*, 828 F.2d 1272, 1277-79 (8th Cir.1987) (distinguishing privity between principal and agent from privity between a governmental entity and officials sued in their individual capacities). *See* also *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 188 (5th Cir.1990) ("Res judicata does not apply when the parties appear in one action in a representative capacity and in a subsequent action in an individual capacity.").

The rule of differing capacities therefore enables Mitchell to assert individual capacity claims against Chapman, Derrickson, and Nickles.

3. Was Or Should Have Been Litigated In The Prior Action

The central purpose of claim preclusion is to prevent the "relitigating of issues that were or could have been raised in [a prior] action." *Federated Dep't Stores, Inc., v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). The district court determined that Mitchell could have brought his Title VII, FMLA, 42 U.S.C. § 1983, Fourteenth Amendment, and KCRA claims in *Mitchell I.* The record supports the district court's finding.

It is undisputed that Mitchell was aware of all of the facts giving rise to his claims at the time he filed *Mitchell I.* Indeed,

Mitchell expressly alleged disability discrimination[12] and violations of the FMLA in both his Grievance and his EEO charge filed prior to Mitchell I. (J.A., 42, 160.)

In an effort to explain his failure to assert all of his potential claims, Mitchell alleges he refrained from filing a FMLA action in *Mitchell I* because that claim was the subject of the Grievance.[13] As the district court noted, Mitchell fails to cite any provision of the CBA requiring him to submit FMLA claims to binding arbitration prior to initiating a civil action. (J.A., 33.) Assuming arguendo, that the CBA mandates binding arbitration, it is well-established that the CBA must contain a "clear and unmistakable waiver" of Mitchell's FMLA rights to foreclose his entitlement to a judicial forum. *See Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 631-632 (6th Cir.1999) (citing *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 82, 119 S.Ct. 391, 142 L.Ed.2d 361 (1998)); *Plumley v. Southern Container, Inc.*, 303 F.3d 364 (1st Cir.2002) (applying the "clear and unmistakable" waiver standard to FMLA claims); *Rogers v. New York University*, 220 F.3d 73 (2d Cir.2000) (same). Mitchell fails to demonstrate any provision of the CBA containing a clear and unmistakable waiver of his statutory claims. Consequently, Mitchell fails to provide a sufficient justification for failing to file his statutory claims.[14]

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[12]Mitchell brought his Title VII claim on the basis of disability discrimination. Under Title VII, it is unlawful for an employer to discharge or otherwise discriminate against an individual with respect "to compensation, terms, conditions or privileges of employment on the basis of the individual's race, color, religion, sex or national origin." See 42 U.S.C. § 2000e-2(a). Title VII does not address disability discrimination.

[13]Mitchell provides no explanation as to his failure to assert the other claims alleged in *Mitchell II.*

[14] It must be acknowledged, however, that the stringent timing requirements of 29 C.F.R. § 1614.101, et seq., present potential perils for a party alleging multiple claims in separate administrative fora. Here, Mitchell was required to file *Mitchell I* within ninety days of his receipt of the right to sue letter, dated August 19, 1999. Admittedly, Mitchell's

4. Conclusions regarding claim preclusion

The doctrine of claim preclusion thereby renders the district court's judgment in *Mitchell I* as a bar to the claims asserted against the USPS, as well as the claims alleged against Chapman, Derrickson, and Nickles in their official capacities.

Claim preclusion does not, however, extend to the individual capacity claims asserted against Chapman, Derrickson, and Nickles because of the rule of differing capacities. As the district court correctly noted, Mitchell was not barred from arguing the merits of his individual capacity claims alleged pursuant to Title VII, the Rehabilitation Act, the KCRA, the FMLA, 42 U.S.C. § 1983, and the Fourteenth Amendment.[15]

B. Mitchell's 42 U.S.C. § 1983 and Fourteenth Amendment Claims

Mitchell asserts that the district court should have considered his 42 U.S.C. § 1983 and Fourteenth Amendment claims in light of *Bivens*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619.

FMLA Grievance was pending in Step 3 of the grievance procedure during this period. The appropriate course of action in this scenario was for Mitchell to timely file his civil action, alert the district court as to the pendency of the FMLA Grievance, and request a stay of the judicial proceedings while awaiting the resolution of the grievance. *See Churchill v. Star Enters.*, 183 F.3d 184, 192 (3d Cir.1999) ("Attorneys should organize litigation that they are pursuing to avoid claim preclusion."). Upon resolution of the grievance, Mitchell could request the court to lift the stay and seek leave to amend his complaint in order to allege the FMLA action. To do otherwise, creates the very risk presented herein of obtaining a partial, yet preclusive, judgment.

[15]Mitchell wisely fails to present any argument on appeal with respect to his Title VII, the Rehabilitation Act, or KCRA claims. *See Wathen*, 115 F.3d at 404-05 n. 6 (6th Cir.1997) (reaffirming that Title VII does not provide for individual liability and the KCRA does not impose individual liability); *Hiler v. Brown*, 177 F.3d 542 (6th Cir.1999) (holding that the Rehabilitation Act does not impose individual liability). Consequently, these claims are considered abandoned for the purposes of appeal. *See Enertech v. Mahoning County Comm'rs*, 85 F.3d 257 (6th Cir.1996).

Mitchell's argument requires little analysis. In *Bivens*, the Supreme Court recognized a right to recover damages against federal officials who violate an individual's constitutional rights. *See Bivens*, 403 U.S. at 395, 91 S.Ct. 1999. Mitchell did not allege a *Bivens* claim in *Mitchell II*; rather, he averred claims pursuant to Section 1983. There lacks any authority in support of Mitchell's blanket proposition that a court must convert a Section 1983 claim asserted against federal officials to one asserting *Bivens* violations. Assuming arguendo, that this Court were to place such a requirement on the district courts, Mitchell's claim nevertheless fails. *Bivens* claims have a one year statute of limitations under Kentucky law. *See McSurely v. Hutchison*, 823 F.2d 1002 (6th Cir.1987). As the district court acknowledged, Mitchell filed his Section 1983 claim (or the purported *Bivens* action) nearly three years past the limitations period. (J.A., 34.)

Furthermore, it is well-settled that USPS employees may not allege *Bivens* claims arising out of their employment relationship with the USPS. *See Harper v. Frank*, 985 F.2d 285, 290 (6th Cir.1993). *See also Turner v. Holbrook*, 278 F.3d 754 (8th Cir.2002); *Pipkin v. United States Postal Serv.*, 951 F.2d 272, 275 (10th Cir.1991). Consequently, Mitchell's purported *Bivens* claim fails as a matter of law.

C. FMLA Individual Liability for Public Agency Employers

Mitchell's final assertion on appeal is that the district court erroneously interpreted the FMLA as to preclude individual liability claims against public agency employers. The issue of whether the FMLA provides for individual liability against a public employer is a matter of first impression for this Court.

"Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *See Lake Cumberland Trust, Inc. v. United States Environmental Protection Agency*, 954 F.2d

1218, 1222 (6th Cir.1992) (citation omitted). The plain meaning of the statute controls, except in rare cases in which the literal application of the statutory language would compel an odd result or produce a result demonstrably at odds with legislative intent. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989). We must begin with the statute's plain language, and may resort to a review of congressional intent or legislative history only when the language of the statute is not clear. *See In re Comshare, Inc.*, 183 F.3d 542, 549 (6th Cir.1999) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980)).

Turning to the statute, the FMLA entitles "eligible employees" to take up to twelve weeks of unpaid leave in any twelve-month period for qualifying medical or family reasons. *See* 29 U.S.C. § 2612(a)(1). The statute ensures that the employee will be restored to the same or an equivalent position upon returning to work. *See* 29 U.S.C. § 2614(a)(1).

The statute creates a private right of action entitling "eligible employees" to seek both equitable relief and money damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," 29 U.S.C. § 2617(a)(2), should that employer "interfere with, restrain, or deny the exercise of" FMLA rights, 29 U.S.C. § 2615(a)(1).

The FMLA expressly incorporates into its provisions the Fair Labor Standards Act's ("FLSA"), 29 U.S.C. §§ 201-219 (1994), definition of "employee." *See* 29 U.S.C. § 2611(3) ("The terms 'employ', 'employee', and 'State' have the same meanings given such terms in subsections (c), (e), and (g) of section 203 of this title [the FLSA]."). The FLSA defines employee as "any individual employed by an employer" and includes "any individual employed by the United States Postal Service." 29 U.S.C. § 203(e)(1) & (2)(B). An "eligible employee" under the FMLA is an "employee" who "has been employed for at least 12 months by the employer with respect

to whom leave is requested ...; and for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A).

The FMLA defines "employer" as follows:

> (4) Employer
>
> (A) In general
>
> The term "employer"--
>
> (I) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or proceeding calendar year;
>
> (ii) includes--
>
> (I) any person who acts, directly or indirectly, in the interest of an employer to any employees of such employer; and
>
> (II) any successor in interest of the employer;
>
> (iii) includes any "public agency", as defined in section 203(x) of this title; and
>
> (iv) includes the General Accounting Office and the Library of Congress.
>
> (B) Public agency.
>
> For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

29 U.S.C. § 2611. [16]

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[16] The FMLA again borrows from FLSA for its definition of "public agency." Title 29 U.S.C. § 203(x), which is referenced in the FMLA's definition of "employer," provides the following definition of "public agency":

> (x) "Public Agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States

The issue of whether the FMLA imposes individual liability turns on an interpretation of the term "employer." Of particular pertinence, the FMLA defines an "employer," in part, as "any person who acts, directly or indirectly, in the interest of the employer." 29 U.S.C. § 2611(4)(A)(ii)(I). This language mirrors the FLSA's definition of employer. *Compare* 29 U.S.C. § 2611(4)(A)(ii)(I) with 29 U.S.C. § 203(d) ("Employer includes any person acting directly or indirectly in the interest of any employer in relation to an employee and includes a public agency, but does not include a labor agency...."). This is not a coincidence. The applicable regulations indicate:

> An "employer" [under the FMLA] includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. The definition of "employer" in section 3(d) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(d), similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers "acting in the interest of an employer" are individually liable for any violations of the requirements of the FMLA.

29 C.F.R. § 825.104(d);[17] *see also Chandler v. Specialty Tires of Am.*, 283 F.3d 818, 827 (6th Cir.2002) (recognizing that the provisions of the FMLA generally mirror those provided in the

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> (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

29 U.S.C. § 203(x)

[17] The Secretary of Labor has the authority to issue regulations pertaining to the FMLA. *See* 29 U.S.C. § 2654. Generally, we defer to the regulations when determining how to interpret a statute, as long as the regulations present a reasonable interpretation of the statute. *See Intermet Corp. & Subsidiaries v. Commissioner*, 209 F.3d 901, 904 (6th Cir.2000). That is, the regulation must "implement the congressional mandate in some reasonable manner." *United States v. Correll*, 389 U.S. 299, 307, 88 S.Ct. 445, 19 L.Ed.2d 537 (1967).

FLSA) (citation omitted). This Court has interpreted the FLSA's "any person who acts, directly or indirectly, in the interest of the employer" language to impose individual liability on private-sector employers. *See United States Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775 (6th Cir.1995); *Fegley v. Higgins*, 19 F.3d 1126 (6th Cir.1994). The presence of identical language in the FMLA tends to support a similar finding. *See Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir.2002) (comparing the FMLA and FLSA definitions of "employer" and determining that each statute imposes individual liability); *see also Cantley v. Simmons*, 179 F.Supp.2d 654, 655-58 (S.D.W.Va.2002) ("[I]ndividual liability is permitted under the FMLA."); *Brunelle v. Cytec Plastics*, 225 F.Supp.2d 67, 82 (D.Me.2002) (holding that individual liability under the FMLA arises from a similar definition of employer under the FLSA); *Richardson v. CVS Corp.*, 207 F.Supp.2d 733, 741-44 (E.D.Tenn.2001) (finding that the majority of the courts have found "that individuals can be subject to liability under the FMLA"); *Morrow v. Putnam*, 142 F.Supp.2d 1271, 1275-76 (D.Nev.2001) (holding that individual liability exists under the FMLA); *Longstreth v. Copple*, 101 F.Supp.2d 776, 780 (N.D.Iowa) (same); *Carpenter v. Refrigeration Sales Corp.*, 49 F.Supp.2d 1028, 1030 (N.D.Ohio 1999) (recognizing that the majority of courts extend individual liability in FMLA claims); *Meara v. Bennett,* 27 F.Supp.2d 288, 290 (D.Mass.1998) ("Although the court has not been able to locate any Court of Appeals decisions addressing the issue of individual liability under the recently enacted FMLA, the decisional law developing at the district court level appears to favor individual liability."); *Bryant v. Delbar Prods., Inc.*, 18 F.Supp.2d 799, 807-09 (M.D.Tenn.1998) (noting that "the majority of courts have determined that the FMLA extends individual liability to those who control a plaintiff's ability to take a leave of absence"); *Mercer v. Borden*, 11 F.Supp.2d 1190, 1190 (C.D.Cal.1998) ("Since the definition of 'employer' in the FMLA is identical to the definition of 'employer' in the [Fair

Labor Standards Act], the Court holds that individuals are potentially subject to liability under the FMLA. The plain language of the FMLA compels this result."); *Rupnow v. TRC,* Inc., 999 F.Supp. 1047, 1048 (N.D.Ohio 1998) ("[T]he weight of authority favors individual liability for a supervisor where the 'supervisor exercise[s] sufficient control over the plaintiff's ability to take protected leave.' "); *Stubl v. T.A. Systems, Inc.*, 984 F.Supp. 1075, 1083 (E.D.Mich.1997) ("Although reasonable arguments could be made that the policy rationale underlying the Title VII decisions finding no individual liability should dictate the same result under the FMLA, the plain language of the statute and the regulations mandate otherwise."); *Waters v. Baldwin County*, 936 F.Supp. 860, 863 (S.D.Ala.1996) (finding that "employer" as used in the FMLA parallels "employer" in the FLSA; therefore, individual liability exists under the FMLA); *Knussman v. Maryland*, 935 F.Supp. 659, 664 (D.Md.1996) ("Liability of individual defendants in their individual capacities is not foreclosed under the FMLA."); *Johnson v. A.P. Prod., Ltd.*, 934 F.Supp. 625 (S.D.N.Y.1996) (holding that "employer" in the FMLA mirrors that used in the FLSA which imposes individual liability); *Freemon v. Foley,* 911 F.Supp. 326 (N.D.Ill.1991) (same).[18]

However, the narrow issue before this Court is whether the FMLA imposes individual liability on *public agency* employers. The FMLA's definition of "employer" segregates the specific provision regarding individual liability (i.e., the "directly or indirectly" clause), *see* 29 U.S.C. § 2611(4)(A)(ii)(I) (hereinafter the "individual liability provision"), from the specific provision addressing "public agency" employers, *see* 29 U.S.C. § 2611(4)(A)(iii) (hereinafter

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[18] *But see Carter v. Rental Uniform Serv. of Culpeper, Inc.*, 977 F.Supp. 753, 759 (W.D.Va.1997) (following Title VII case law and finding no individual liability under the FMLA); *Frizzell v. Southwest Motor Freight, Inc.*, 906 F.Supp. 441 (E.D.Tenn.1995) (analogizing the FMLA to Title VII and rejecting individual liability under the FMLA).

the "public agency provision"). The Court of Appeals for the Eighth Circuit has determined that this separation is of little interpretative import, noting that it did not see " 'why public officials should be exempted from liability while managers in the private sector are not.' " *Darby*, 287 F.3d at 681 (quoting *Morrow*, 142 F.Supp.2d at 1275). In contrast, the Court of Appeals for the Eleventh Circuit has determined that the FMLA does not impose individual liability on employees of public agencies. *See Wascura v. Carver*, 169 F.3d at 683, 686 (11th Cir.1999).

Notwithstanding the guidance from these decisions, we respectfully note that neither *Darby* nor *Wascura* attempt a textual analysis of the FMLA. The court in *Darby* limited its reasoning to the general proposition that public and private employers should not be treated separately under the statute. *See Darby*, 287 F.3d at 681. The *Wascura* court concluded that it was constrained by a prior decision of that court that did not extend individual liability under the FLSA to public agency employers. *See Wascura*, 169 F.3d at 686 (citing *Welch v. Laney*, 57 F.3d 1004 (11th Cir.1995)). By addressing the issue in terms of the FLSA, the Eleventh Circuit avoided the potential interpretive dilemma posed in 29 U.S.C. § 2611(4).

Similarly, the district courts have resolved the issue with conflicting results. *See Morrow*, 142 F.Supp.2d at 1273 (allowing FMLA suit against individual postal supervisors); *Keene*, 127 F.Supp.2d at 776 (holding no governmental individual liability under the FMLA); *Kilvitis v. County of Luzerne*, 52 F.Supp.2d 403, 412 (M.D.Pa.1999) (allowing FMLA suit against district justice in individual capacity); *Meara*, 27 F.Supp.2d at 291 (allowing FMLA suit against the district attorney in his individual capacity); *Knussman*, 935 F.Supp. at 664 (allowing FMLA individual capacity suit against officers in state highway patrol); *Freemon*, 911 F.Supp. at 330-31 (allowing FMLA supervisory liability claim against state hospital employee); *Frizzell*, 906 F.Supp. at 449

(determining no supervisory liability for public officials under the FMLA).

Our independent examination of the FMLA's text and structure reveals that the statute does not impose individual liability on public agency employers. Three factors compel this conclusion.

First, the section defining "employer," 29 U.S.C. § 2611(4)(A), explicitly separates the individual liability provision and public agency provision into two distinct clauses. Section 2611(4)(A)[19] commences with " 'The term employer--' ", and follows with four clauses addressing what the term "employer" "means" and "includes." *See* 29 U.S.C. § 2611(4)(A). The use of an em dash following "employer" indicates that clauses (I), (ii), (iii), and (iv) modify the term "employer." [20] Therefore, the plain text of the statute provides the following definition of "employer":

> (1) An employer means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of the 20 or more calendar workweeks in the current or proceeding calendar year. *See* 29 U.S.C. § 2611(4)(A)(i).
>
> (2) An employer includes any person who acts directly or indirectly in the interest of an employer to any of the employees of such employer; and an employer includes any successor in interest of an employer. *See* 29 U.S.C. § 2611(4)(A)(ii).

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[19] All further citations to "Section" shall refer to Title 29 of the United States Code.

[20] Throughout the FMLA, the use of the em dash indicates that the provisions following the em dash modify the immediately preceding provision or term. *See, e.g.,* 29 U.S.C. § 2601(a) & (b); § 2611(2)(A) & (B), (6), (11), (12); § 2612(b)(2),(e)(2), (f); § 2613(b); § 2614(a), (c)(2), (3); § 2615(b); § 2617; § 2618; § 2632.

(3) An employer includes any "public agency" as that term is defined in the FLSA. *See* 29 U.S.C. § 2611(4)(A)(iii).

(4) An employer includes the General Accounting Office and the Library of Congress.[21] *See* 29 U.S.C. § 2611(4)(A)(iv).

The relationship between "employer" and clauses (I)-(iv) is not in contention. Rather, it is the purported interrelationship among clauses (I)- (iv) that yields conflicting views regarding whether the FMLA imposes individual liability on public agency employers. *Compare Keene*, 127 F.Supp.2d at 775 (explaining that Congress separated the individual liability provision from the public agency provision in an effort to clarify the "commingling" of public agency and private employers evident in the FLSA) *with Morrow*, 142 F.Supp.2d at 1273 (interpreting the individual liability provision and public agency provision as inter-related.) An examination of Section 2611(4)(A)'s text and structure demonstrates that the individual liability provision and public agency provision are separate and distinct.

As noted earlier, the FMLA introduces related provisions through the use of the em dash. In accordance with this practice, Section 2611(4)(A) implements the em dash into its definition of employer. *See* 29 U.S.C. § 2611(4)(A). Similarly, Section 2611(4)(A)(ii) utilizes the em dash to establish a relationship between the individual liability provision and the provision addressing successors in interest. *See* 29 U.S.C. § 2611(4)(A)(ii). Notwithstanding this repeated and consistent use of the em dash, Section 2611(4)(A) lacks any punctuation demonstrating an inter- relationship between clauses (ii)-(iv). Indeed, the separation of otherwise related concepts (i.e., what the term "employer" "includes") into distinctly enumerated

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[21] Congress added Section 2611(4)(A)(iv) several years following the enactment of the FMLA. *See* Pub.L. 104-1, § 202(c)(1)(A) (1995).

clauses compels an interpretation that treats each clause in an independent manner. This is particularly the case in light of clause (ii)'s inclusion of an em dash preceding the individual liability provision and successor in interest provision. *See* 29 U.S.C. § 2611(4)(A)(ii). It stands to reason that if clauses (ii)-(iv) are similarly inter-related, the text of the statute would likewise provide punctuation or analogous language linking the clauses. In the absence of such guidance, and in accordance with the plain text's separation of the clauses into distinct provisions, the structure of Section 2611(4)(A) patently demonstrates that the individual liability provision and public agency provision are separate and distinct.

The text of Section 2611(4)(A) further compels an interpretation that separates the individual liability provision from the public agency provision. The straightforward interpretation advanced *supra*, demonstrates that the term employer "means" what is included in clause (I) and "includes" what is provided in clauses (ii), (iii), and (iv). On the other hand, the commingling of clauses (I)-(iv) into the term "employer" yields an interpretation that renders other provisions of the statute superfluous, as well as creates several oddities.

Initially, an interpretation that commingles clauses (I) and (ii) into the definition of employer presents little difficulty. For instance: "The term employer means any person engaged in interstate commerce ... who employees 50 or more employees ...; and includes any person who acts directly or indirectly in the interest of any person engaged in interstate commerce who employs 50 or more employees ...; and any successor in interest of any person engaged in interstate commerce ... who employs fifty or more employees...."[22] *See* 29 U.S.C. § 2611(4)(A)(i) & (ii). However, when the public agency provision is introduced

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[22] This interpretation underlies our prior determination that the FMLA extends individual liability to private-sector employers.

into an interpretation with clauses (I) and (ii), the statute provides--"the term employer means any person engaged in interstate commerce ... who employees 50 or more employees ...; and includes any person who acts directly or indirectly in the interest of any person engaged in interstate commerce ... who employs 50 or more employees ...; and any successor in interest of any person engaged in interstate commerce ... who employs fifty or more employees; and includes any public agency engaged in interstate commerce ... who employs 50 or more employees ...; and includes any person who acts directly or indirectly, in the interest of the public agency engaged in interstate commerce ... who employs fifty or more employees; and any successor in interest of the public agency ... engaged in interstate commerce ... who employs fifty or more employees...." *See* 29 U.S.C. 2611(4)(A)(i),(ii), & (iii).

Beyond the obvious redundancy in this interpretation, the commingling of clause (I) and (ii) with the public agency provision renders superfluous Section 2611(4)(B). *See* 29 U.S.C. 2611(4)(B) ("[A] public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce."). In addition, it is well-settled that a public agency does not have to meet the 50 employee requirement to be considered an employer under the statute. *See* 29 C.F.R. § 825.104(a) ("Public agencies are covered employers without regard to the number of employees employed."). Consequently, an interpretation commingling clauses (I), (ii), and (iii) into the FMLA's definition of employer cannot be sustained. *See Lake Cumberland Trust*, 954 F.2d at 1222.

The result is similarly untenable when the interpretation aggregates clause (iv) with clauses (I) and (ii).[23] The result

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[23] A plain text interpretation of the statute would require commingling (I), (ii), (iii), and (iv). In the interests of convenience and brevity, the Court shall proceed with its analysis of (iv) by omitting (iii)

yields the following: "The term employer means any person engaged in interstate commerce ... who employs 50 or more employees ...; and includes any person who acts, directly or indirectly, in the interest of any person in interstate commerce ... who employs fifty or more employees ...; and includes a successor in interest of any person engaged in interstate commerce ... who employs fifty or more employees ...; and includes the General Accounting Office and the Library of Congress; and includes a successor in interest of the General Accounting Office and the Library of Congress." *See* 29 U.S.C. § 2611(4)(A)(i), (ii), & (iv). This interpretation implies that the FMLA extends specific protection to employees of the GAO and the Library of Congress from future successors in interest. While the Court would at least consider, albeit skeptically, an interpretation of the FMLA that included protections against a successor in interest of public agencies in general,[24] it is an exercise in absurdity to consider that the FMLA sought to protect employees of two long-standing federal entities from threats posed by any future successors in interest.[25] Accordingly, we must reject an interpretation that creates such a result. *See Lake Cumberland Trust*, 954 F.2d at 1222.

A third factor also undermines an interpretation of employer that extends the individual liability provision to public agencies. A definition of employer that incorporates the

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as the difficulties of clause (iii) have been previously discussed.

[24] Notwithstanding the relatively unique factual scenario addressing successive public entities, the *Morrow* court successfully endeavored to provide a specific instance where an FMLA suit was allowed against the Federal Deposit Insurance Corporation as a successor in interest to the Resolution Trust Corporation. *See Morrow*, 142 F.Supp.2d at 1273 (citing *Rhoads v. FDIC*, 956 F.Supp. 1239, 1254 (D.Md.1997)).

[25] The Library of Congress, established in 1800, is the nation's oldest federal cultural institution. The Budget and Accounting Act of 1921, 42 Stat. 20, created the GAO.

individual liability provision and public agency provision into a single clause is substantially similar to, if not identical, to the FLSA's definition of employer. *Cf.* 29 U.S.C. § 203(d) ("Employer includes any person acting directly or indirectly in the interest of any employer in relation to an employee and includes a public agency, ..."). As discussed *supra*, the FMLA adopts several of the FLSA's provisions. However, in each instance where the FMLA adopts a provision of the FLSA, the FMLA refers directly to the FLSA, rather than provides a restatement of the FLSA's provision. The court in *Keene* explained the significance of the FMLA's modification of the FLSA's "employer":

> In 1974 Congress merely engrafted "Public Agency" into the FLSA by adding to an existing definition for private employers. This did create an ambiguous situation concerning the liability of public agency employees. But, in the FMLA, Congress explicitly took "Public Agency" out of the private employer definition and disconnected it from liability based on a person acting directly or indirectly in the interest of an employer. Therefore, a better way to view the situation is that the FMLA corrected the ambiguity of the FLSA, as opposed to letting the ambiguity of the FLSA control the interpretation of the FMLA.

Keene, 127 F.Supp.2d at 775.[26] This rationale is entirely persuasive in light of the FMLA's text and framework.

We therefore conclude that the FMLA's individual liability provision does not extend to public agencies. Three factors emanating from the text and framework of the statute support

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[26] The *Keene* court's analysis of the legislative history of the FLSA's public agency provision is in accord with prior decisions of the United States Supreme Court, as well as the decisions of this Court. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985); *Marshall v. Owensboro-Daviess County Hosp.*, 581 F.2d 116 (6th Cir.1978).

this conclusion. First, Section 2611(4)(A) segregates the provision imposing individual liability from the public agency provision. Second, an interpretation that commingles the individual liability provision with the public agency provision renders certain provisions of the statute superfluous and results in several oddities. Finally, as evidenced by other provisions of the statute, the FMLA distinguishes its definition of employer from that provided in the FLSA by separating the individual liability and public agency provisions.

We note in passing that several factors extending beyond the plain text of the statute support our conclusion against individual liability for public employers. First, our interpretation is in accord with the regulations propounded by the Secretary of Labor. Title twenty nine 29 C.F.R. § 825.104(a) provides that "employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency." 29 C.F.R. § 825.104(a). The regulation's express separation between public agency and the "directly or indirectly" language supports our similar interpretation of Section 2611(4)(A). In addition, the example of individual liability provided in the regulations exclusively pertains to the corporate setting, thereby evincing an intent to limit such liability to the private sector. *See* 29 C.F.R. § 825.104(d) ("As under the FLSA, individuals such as corporate officers 'acting in the interest of an employer' are individually liable for any violations of the requirements of the FMLA."). In that same vein, we note that this Court has never extended individual liability to public employees under the FLSA.[27] Consequently,

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[27] In *Wong-Opasi v. Tennessee State Univ.*, Nos. 99-5658, 99- 5660, 2000 WL 1182827, 2000 U.S.App. LEXIS 21242 (Aug. 16, 2000), this Court addressed, inter alia, an FLSA claim asserted against administrators of a state college and ultimately concluded that the claim lacked merit. As an unpublished opinion, the decision is not binding precedent. *See Bell v.*

in addition to the text and structure of the statute, the regulations interpreting the FMLA and this Court's lack of precedent to the contrary, compel the conclusion that the FMLA does not impose individual liability on public agency employers.

Accordingly, we conclude that the district court correctly interpreted the FMLA as to preclude Mitchell's individual capacity claims under the statute.

V.

For the foregoing reasons, the decision of the district court granting summary judgment in favor of the defendants is **AFFIRMED**.

Johnson, 308 F.3d 594 (6th Cir.2002). Moreover, in light of the ultimate disposition of the case, the issue of individual liability for public agency employers was of little relevance. Simply, this Court has not addressed a textual analysis of whether the FLSA imposes individual liability on public agency employers.

No. 01.5571

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Filed December 23, 2003

JOEY L. MITCHELL, Plaintiff-Appellant	)	
v.	)	ORDER
GLENN CHAPMAN, ET AL., Defendants-Appellees.	)	

BEFORE: GILMAN and GIBBONS, Circuit Judges; and ECONOMUS,* District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

* Hon. Peter C. Economus, United States District Judge for the Northern District of Ohio, sitting by designation.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

IN LEXINGTON

CIVIL ACTION NO. 00-179

JOEY L. MITCHELL PLAINTIFF

vs. OPINION & ORDER

GLENN CHAPMAN, *et al.* DEFENDANTS

****

Presently before the Court is defendants' motion to dismiss or in the alternative for summary judgment [DE #12]. Having been fully briefed, this matter is ripe for review.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 15, 2000, plaintiff Joey L. Mitchell filed this action against the United States Postal Service ("Postal Service"), Postmaster General William J. Henderson, and three other Postal Service employees, Glenn Chapman, Rick Derrickson, and Naewana Nickles. Plaintiff alleges violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; 42 U.S.C. § 1983; the Equal Protection Clause of the Fourteenth Amendment; the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*; the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*; and the Kentucky Civil Rights Act ("KCRA"), KRS Chapter 344.

Plaintiff was hired by the Postal Service as a letter carrier at the Paris, Kentucky, post office on July 8, 1995. Plaintiff is a veteran with a twenty percent service-connected disability involving tinnitus and chronic neck pain.

On November 26, 1996, plaintiff's physician, Dr. Ballard Wright, certified that plaintiff suffered from a chronic serious health condition under the FMLA which would occasionally require plaintiff to be absent from work.

On February 12, 1997, plaintiff requested a transfer to a clerk position.

Plaintiff alleges that he used eight hours of unscheduled FMLA leave on May 12, 1997, after suffering a strain while carrying boxes of canned goods and food for a food drive. When he returned to work on May 13, 1997, his supervisor, Chapman, reprimanded him for using his FMLA leave. According to plaintiff, Paris Postmaster Derrickson and Chapman refused to certify plaintiff's absence as FMLA leave, compelling plaintiff to use eight hours of unscheduled sick leave. Plaintiff further alleges that Derrickson and Chapman removed his duties as a letter carrier and required him to produce an updated FMLA certification form and a statement from his doctor clearing him to perform duties as a letter carrier. Plaintiff submitted a second FMLA certification and a letter from Dr. Wright, which stated:

> At the present time Mr. Mitchell [sic] is medically cleared to perform his duties as letter carrier for the U.S. Postal Service with no restrictions. However, if a less physically strenuous position becomes available I would strongly recommend that he be considered for such a position so as not to exacerbate his head and neck pain since he has responded so well to treatment and therapies at our facility.

(Derrickson Decl. Ex.7.). After receiving the updated certification and Dr. Wright's letter, Chapman and Derrickson denied plaintiff permission to carry mail.

The Postal Service then required plaintiff to undergo a fitness-for-duty examination to determine whether plaintiff could continue to carry mail without resulting in a job-related condition with long-term implications and whether plaintiff could perform as a clerk without aggravating his condition. On May 23, 1997, plaintiff was examined by Dr. Robert Davenport, a physician under contract with the Postal Service. Dr. Davenport concluded that plaintiff could continue carrying

mail as long as he did not use a satchel until he had an evaluation by a neurosurgeon and that plaintiff could perform a clerk job.

Plaintiff was referred to a neurosurgeon, Dr. John Gilbert, for an evaluation. Dr. Gilbert examined plaintiff on June 30, 1997, and issued a report releasing plaintiff to work full duty without restrictions. Defendant Nickles, who is employed by the Postal Service as an occupational health nurse administrator, found Dr. Gilbert's report deficient in several respects and request that Dr. Gilbert expand on his original report by addressing several specific issues. Dr. Gilbert issued a second report dated August 5, 1997. Regarding work restrictions, Dr. Gilbert's second report stated:

> Again, after discussion with the patient, he told me he felt he could do his entire job without any restrictions and this is my best estimate right now. If you want more detailed restrictions, he would need a functional capacity evaluation done by a licensed physical therapist and this would give you the best estimate of what he could carry and what poundage would be his restriction. However, based on my exam and my discussion with the patient and the fact that the patient tells me that he feels he can do his job without restrictions, I feel this is not unreasonable for him to perform this job without restrictions. If you would like a more detailed assessment of restrictions, then, as I mentioned above, we would need to proceed with a functional capacity evaluation done by a licensed physical therapist to determine his restrictions.
>
> I note in your records that he has said that the stresses from carrying a satchel cause him problems on his neck. If this is indeed true, then I would recommend that he not carry the satchel. However, the patient did not tell me this. He told me that he felt he could do his job without restrictions. If you want to be on the safe side and if it is true that the patient feels that the satchel's giving him problems, then we

need to get rid of the satchel.

(Nickles Decl. Ex. 8.)

On August 11, 1997, plaintiff again requested a transfer to a clerk position. The request was approved on August 19, 1997, with an effective date of August 30, 1997.

Dr. Gilbert issued another report dated August 25, 1997. Dr. Gilbert's report noted that plaintiff "can't work with a neck harness because he says it puts him at high risk." (Nickles Decl. Ex. 10.). Dr. Gilbert recommended releasing plaintiff to full duty restricted to using a waist harness and stated that he would consider plaintiff a low risk while using a waist harness. Plaintiff alleges that he submitted Dr. Gilbert's third report to the Postal Service and requested that he be reinstated as a letter carrier. His request was denied.

On October 30, 1997, plaintiff requested EEO counseling regarding his claim that he was discriminated against based on his disability. He then filed an administrative complaint of discrimination alleging that he was denied the accommodation of a waist harness on August 25, 1997. On August 19, 1998, the Postal Service's Office of EEO Compliance and Appeals dismissed the complaint on the grounds that plaintiff failed to contact an EEO counselor within forty-five days of the alleged discriminatory act.

On November 17, 1998, plaintiff filed a civil action with this Court, Lexington Civil Action No. 98-469, naming the Postal Service and Postmaster General Henderson as defendants and alleging that the Postal Service discriminated against him based on his disability when it failed to allow him to remain in his letter carrier position with the accommodation of a waist harness in violation of the Rehabilitation Act and the ADA. On March 29, 1999, this Court entered summary judgment in favor of the Postal Service and Postmaster General Henderson on the grounds that plaintiff failed to contact an EEO counselor within the time required by 29 C.F.R. § 1614.105(a)(1) and that the

application of equitable tolling was not warranted. The Court denied plaintiff's motion to alter or amend judgment on May 5, 1999.

II. DISCUSSION

A. Standard of Review

Defendants move to dismiss plaintiff's complaint pursuant to Rule 12 (b)(1) for lack of subject matter jurisdiction, pursuant to Rule 12(b)(2) and (3) for lack of personal jurisdiction and venue over Postmaster General Henderson, and pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. In the alternative, defendants move for summary judgment pursuant to Rule 56 on the grounds that there are no genuine issues of material fact and defendants are entitled to judgment as a matter of law.

Rule 12(b) provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Since both parties filed affidavits and exhibits in support of and in response to defendants' motion and the motion is styled in the alternative as a motion for summary judgment, the Court will address defendants' motion as one for summary judgment pursuant to Rule 56.

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See*

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In reviewing a motion for summary judgment, "this Court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Once the moving party shows that there is an absence of evidence to support the nonmoving party's case, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Cos., Inc.* 8 F.3d 335,340 (6th Cir. 1993). Conclusory allegations are not enough to allow a nonmoving party to withstand a motion for summary judgment. *Id.* at 343. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson*, 477 U.S. at 252. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 246-50 (citations omitted).

B. Claims Against Postmaster General Henderson and ADA Claims

Plaintiff concedes that his claims against Postmaster General Henderson in both his official and individual capacities should be dismissed. Plaintiff also concedes that his ADA clams against all defendants should be dismissed. Accordingly, the Court will enter judgment in favor of Postmaster General Henderson on all claims and in favor of all defendants on plaintiff's ADA claims.

C. **Claim Preclusion**

Defendants assert that all plaintiff's claims are barred by the doctrine of claim preclusion based on plaintiff's prior suit against the Postal Service. The application of this doctrine promotes the finality of judgment, increases certainty, discourages multiple litigation, and conserves judicial resources. *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F2d. 474,480 (6th Cir. 1992). Claim preclusion has four elements: (1) a final decision on the merits in the first action by a court of competent jurisdiction; (2) the second action involves the same parties, or their privies, as the first; (3) the second action raises an issue actually litigated or which should have been litigated in the first action; and (4) an identity of the causes of action. *Id.*

1. **Final Decision on the Merits**

Defendant's contend that the Court's summary judgment based on plaintiff's failure to contact an EEO counselor withing forty-five days was a final decision on the merits by a court of competent jurisdiction. Plaintiff does not contest this Court's jurisdiction over his prior action and concedes that the summary judgment was a final decision on the merits.

The scope of a federal district court's judgment is governed by Fed. R. Civ. P. 41(b). *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978). Rule 41(b) provides:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

The Sixth Circuit has declined to address whether a dismissal for failure to satisfy a condition precedent should be considered an adjudication on the merits for claim preclusion purposes. *See Rivers v. Barberton Bd. of Educ.*, 143 F.3d 1029, 1032 (6th

Cir. 1998). The court of appeals has found that the deadline for contacting an EEO counselor is not a jurisdictional prerequisite to bringing suit but is like a statute of limitations. *Boddy v. Dean*, 821 F.2d 346, 350 (6th Cir. 1987) (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). Further, the court of appeals has held that a dismissal on statute of limitations grounds is an adjudication on the merits for purposes of claim preclusion. *Cemer*, 583 F.2d at 832. Based on these holdings, the Court concludes that the Court's dismissal of plaintiff's claims for failure to contact an EEO counselor within the time limit was a final decision on the merits. *See also Kratville v. Runyon*, 90 F.3d 195, 198 (7th Cir. 1996) ("A decision by a federal court that a statute of limitations or an administrative deadline bars an action is a decision on the merits for purposes of claim preclusion.")

b. **Involving the Same Parties or Their Privies**

Plaintiff's prior action named Postmaster General Henderson and the Postal Serves as defendants. Plaintiff brings the instant action against Postmaster General Henderson, the Postal Service, and three other Postal Service employees, Chapman, Derrickson, and Nickles. A suit against a public official in his or her official capacity is equivalent to a suit against the government entity. *Soper v. Hoben*, 195 F.3d 845, 853 (6th Cir.) (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). Generally, an official sued in his or her official capacity is in privity with the governmental entity. *Conner v. Reinhard*, 847 F.2d 384, 394 (7th Cir. 1988). Therefore, the Postal Service and the individual defendants in their official capacities are entitled to assert the defense of claim preclusion.

Defendant's dispute whether plaintiff has asserted claims against the individual defendants in their personal capacities. The complaint states that the individual defendants acted at all relevant times in their capacities as employees of the Postal Service and does not specify that the individual defendants are being sued individually. However, the complaint directs that

the individual defendants be served in both their individual and official capacities. The complaint also asserts that the defendants' violations were "willful" and that the defendants "knew or showed reckless disregard of their conduct." The complaint taken as a whole provides sufficient notice to the individual defendants that they are being sued in their personal capacities.

In *Kentucky v. Graham*, 473 U.S. 159 (1985), the Supreme Court explained the differences between individual and official capacity actions. Personal capacity suits seek to impose personal liability upon a goverment official, and an award of damages against an official in his or her personal capacity can be executed only against the official's personal assets. *Id.* at 165-66. In official capacity suits, the governmental entity is the real party in interest, and the plaintiff must look to the entity to recover damages. *Id.* In addition, different legal theories may be necessary to prove liability in a personal capacity, as opposed to an official capacity, case, and different defenses are available to a defendant who is sued in his or her personal capacity. *Id.* at 166-67. Because of these differences between personal and official capacity actions, courts generally do not consider an official sued in his or her personal capacity as being in privity with the government. *Conner*, 847 F.2d. at 395; *see also Andrews v. Daw*, 201 F.3d 521, 525-26 (4th Cir. 2000); *Headley v. Bacon*, 828 F.2d 1272, 1279 (8th Cir. 1987). Defendants contend that this rule is designed to prevent offensive use of claim preclusion, that is, when a plaintiff asserts that a defendant is bound by a prior judgment. The Court disagrees. In the case cited by defendants, *Andrews v. Daw*, 201 F.3d 521 (4th Cir. 2000), the *defendant* argued that the personal capacity action was barred by claim preclusion based on the prior dismissal of the official capacity action. The Fourth Circuit held that a government employee in his official capacity is not in privity with himself in his individual capacity for purposes of claim preclusion and revered the dismissal of

the individual capacity action. *Id.* at 525-26; *see also Conner* 847 F.2d at 394-96 (holding that defendants sued in individual capacity not in privity with governmental entity when individual defendants asserted that prior suit against governmental entity barred individual capacity action).

In support of their argument that plaintiff's claims against the individual defendants in their individual capacities are barred, defendants rely on *Randles v. Gregart*, 965 F.2d 90 (6th Cir. 1992). *Randles* involved nonmutual issue preclusion, which abandons the requirement of identity of parties, *see* 47 Am. Jur. 2d *Judgments* § 645, and not claim preclusion, which requires identity of parties, *see Sanders Confectionery Prods., Inc.*, 973 F.2d at 480. Therefore, *Randles* in inapplicable.

Based on the foregoing, the Court concludes that while the Postal Service and the individual defendants in their official capacities are entitled to assert the defense of claim preclusion, the individual defendants in their personal capacities are not in privity with the Postal Service and are not entitled to assert claim preclusion as a defense.

c. **Claims Were Brought or Should Have Brought**

The third element of claim preclusion prohibits plaintiff from bringing claims he has already brought or should have brought. *Sanders Confectionery Prods., Inc.*, 973 F.2d at 482. The primary issue is whether the claims could have been maintained in the first action. *Rivers*, 143 F.3d at 1032.

Plaintiff's first action alleged disability discrimination in violation of the Rehabilitation Act and the ADA. In the instant action, plaintiff again asserts disability discrimination claims under those laws as well as other anti-discrimination laws. Clearly, plaintiff's current claims of disability discrimination were raised or could have been raised in the prior action.

In response, plaintiff argues that he could not have brought his FMLA claim in the prior action because he had not exhausted his administrative remedies through his union's

grievance procedure. The FMLA, however, does not require exhaustion of administrative remedies. 29 U.S.C. § 2617(a); *see also Johnson v. Runyon*, No. 1:97-CV-794, 1999 WL 893841, at *4 n. 3 (holding that Postal Service employee was not required to exhaust administrative remedies under the collective bargaining agreement between the Postal Service and his union unless the collective bargaining agreement contained "a clear and unmistakable waiver of the covered [employee's] rights to a judicial forum for federal claims of employment discrimination." *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 82 (1998). Plaintiff has not alleged a clear and unmistakable waiver in the collective bargaining agreement at issue.

Plaintiff's reliance on 29 C.F.R. § 825.702 is misplaced. Section 825.702(a) provides: "When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes." The regulation merely affirms that plaintiff's FMLA claim could have been brought in the prior action.

In addition, plaintiff was clearly aware of his FMLA claims when he filed the prior action. In his initial request for EEO counseling, plaintiff alleged FMLA violations.

The Court finds that nothing prevented joinder of all of plaintiff's claims in the prior action. Accordingly, all of plaintiff's current claims could, and should, have been brought in the prior action, satisfying the third element of claim preclusion.

d. **Identity of Causes of Action**

For purposes of claim preclusion, "[i]dentity of causes of action means an "identity of the facts creating the right of action and of the evidence necessary to sustain each action.' " *Sanders Confectionery Prods,. Inc.* 973 F.2d at 484 (quoting *Westwood Chem. Co. v. Kulick*, 656 F.2d 1224, 2447 (6th Cir. 1981)). The instant complaint's statement of facts are taken

verbatim from the statement of facts contained in the prior action's complaint. The only change is the addition of a paragraph summarizing the prior action. Moreover, the instant complaint alleges that all of plaintiff's claims, including violations of the FMLA and anti-discrimination laws, "arise out of the same operative facts." (Compl. ¶ 4.) Therefore, the identity element is satisfied.

In sum, the Court concludes that all four elements of claim preclusion are present as to plaintiff's claims against the Postal Service and the individual defendants in their official capacities and that dismissal of said claim with prejudice is appropriate.

D. **Individual Capacity Claims**

A. 42 U.S.C. § 1983

Claims under 42 U.S.C. § 1983 actions in Kentucky are limited by the one-year statute of limitations found in KRS 413.140(1)(a). *Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990). Plaintiff's allegations occurred in 1997. As plaintiff filed this action on May 15, 2000, any claims plaintiff might have under § 1983 are barred by the one-year statute of limitations.

Further, "[t]o state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 478 U.S. 42, 48 (1988). A federal employee does not act "under color of state law" for purposes of § 1983. *Castro v. United States*, 775 F.2d 399, 405 (2st Cir. 1985) (citing *District of Columbia v. Carter*, 409 U.S. 418, 423-25 (1973)). Therefore, plaintiff's § 1983 claims against the individual defendants must be dismissed.

2. **Fourteenth Amendment**

The Fourteenth Amendment applies only to state conduct. *Carter*, 409 U.S. at 423. Because the actions of the federal

government and its officers and employees are beyond the scope of the Fourteenth Amendment, *id.* at 424, plaintiff's Fourteenth Amendment claim must be dismissed.

iii. **KCRA**

An individual employee/supervisor may not be held personally liable under the KCRA. *Wathen v. General Elec. Co.*, 115 F.3d 400, 405 (6th Cir. 1997). KRS 344.280, the retaliation statute, does permit imposition of liability on individuals. *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 794 (6th Cir. 2000). Plaintiff fails to state a claim of retaliation because the acts of which he complains predate his administrative complaint of discrimination.

iv. **Title VII**

Title VII prohibits discrimination in federal employment based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-16(a). Plaintiff fails to allege discrimination on any of these grounds and thus fails to state a claim under Title VII. Further, an individual employee/supervisor may not be held personally liable under Title VII. *Wathen*, 115 F.3d at 405.

v. **Rehabilitation Act**

There is no individual liability under the Rehabilitation Act. *Hiler v. Brown*, 177 F.3d 542, 547 (6th Cir. 1999). Accordingly, plaintiff's Rehabilitation Act claims against the individual defendants must be dismissed.

vi. **FMLA**

Defendants assert that there is no individual liability for federal employees under the FMLA. An "employer" may be liable for a violation of the FMLA. 29 U.S.C. § 2617(a)(1). The FMLA defines "employer" as follows:

The term "employer"--

(I) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or

more calendar workweeks in the current or preceding calendar year.

(ii) includes-

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203(x) of this title; and

(iv) includes the General Accounting Office and the Library of Congress.

29 U.S.C. § 2611 (4)(A). The Postal Service fall within the definition of "public agency." 29 U.S.C. § 203(x).

Because § 2611(4)(A)(ii)(I) provides that the term "employer" includes persons acting in the interest of an employer, courts have held that individual liability for corporate officers, manager, and supervisors for violations of FMLA is within the scope of the definition. *See, e.g., Bryant v. Delbar Products, Inc.*, 18 F. Supp. 2d 799, 807 (M.D. Tenn. 1998); *Stubl v. T.A. Systems, Inc.*, 984 F. Supp. 1075, 1082-85 (E.D. Mich. 1997). According to defendants, the same analysis does not apply to cases involving public agencies. Defendants contend that subsection (4)(A)(ii)(I) modifies the general definition of "employer" in subsection (4)(A)(i) and that because subsection (4)(A)(ii) precedes (4)(A)(iii), the subsection including public agencies, it does not modify (4)(A)(iii). The Court agrees. If Congress had intended subsection (4)(A)(ii) to modify the latter subsections (4)(A)(iii) and (iv), then it would have placed subsection (4)(A)(ii) last in the statute. "The fact that it did not do so very strongly suggests that Congress intended subsection (4)(A)(ii) to create individual liability for persons acting on behalf of private employers described in subsection (4)(A)(i) but not for persons acting on behalf of public employer defined by subsections

(4)(A)(iii) and (iv)." *Keene v. Rinaldi*, 127 F. Supp. 2d 770, 776 (M.D.N.C. 2000). As the individual defendants are not "employers" under the FMLA, dismissal of plaintiff's FMLA claims against the individual defendants is warranted.

III. CONCLUSION

Based on the foregoing, the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS that defendants' motion to dismiss or in the alternative for summary judgment [DE #12] is GRANTED and a judgment in favor of defendants shall be entered contemporaneously with this opinion and order.

This 6th day of April, 2001.

/s/
KARL S. FORESTER, CHIEF JUDGE

(2)

Supreme Court, U.S.
FILED
MAY 26 2004
OFFICE OF THE CLERK

No. 03-1359

In the Supreme Court of the United States

JOEY L. MITCHELL, PETITIONER

v.

GLENN CHAPMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

MARK B. STERN
SHARON SWINGLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether the Family Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, imposes individual liability on supervisory employees of a public agency.

2. Whether dismissal of a plaintiff's lawsuit for failure to consult with an agency counselor within 45 days of the alleged discrimination is "on the merits" for claim preclusion purposes.

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In the Supreme Court of the United States

No. 03-1359

JOEY L. MITCHELL, PETITIONER

v.

GLENN CHAPMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 343 F.3d 811. The opinion of the district court (Pet. App. 39a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2003. A petition for rehearing was denied on December 23, 2003 (Pet. App. 38a). The petition for a writ of certiorari was filed on March 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Joey L. Mitchell, an employee of the United States Postal Service, brought this action against the Postal Service, the Postmaster General, and three individual postal employees (respondents). Petitioner claimed that the respondents' refusal to give him a mail carrier position in which he could use a waist harness violated, *inter alia*, the Family and Medical Leave Act (FMLA), 29 U.S.C. 2601 *et seq.*. The district court dismissed the action, and the court of appeals affirmed.

1. In July 1995, petitioner was hired as a mail carrier at the Paris, Kentucky, post office. Pet. App. 2a. Petitioner's treating physician certified that petitioner's chronic neck pain was a "serious illness" under the FMLA that might require periodic absences from work. *Id.* at 2a-3a.

In February 1997, petitioner requested a transfer to a clerk position. Pet. App. 3a. In May 1997, petitioner did not show up for work. *Ibid.* When he returned the following day, his supervisor, respondent Glenn Chapman, told petitioner that the unscheduled absence might hurt his chances of receiving a transfer. *Ibid.* Petitioner responded that his absence was protected leave under the FMLA, and that he would have to file for permanent disability if he were forced to continue working as a mail carrier. *Ibid.*. Chapman alerted respondent Richard Derrickson, the postmaster of the Paris post office, of the possibility that petitioner's health condition might prevent him from carrying mail safely, and Derrickson decided that petitioner should receive a medical fitness-for-duty examination. *Id.* at 3a-4a. In the interim, petitioner was relieved of his mail carrier duties. *Id.* at 4a.

Several days later, petitioner's treating physician "medically cleared" him to return to his position as a mail carrier, but also stated that he should be considered for a "less physically strenuous position" so as not to "exacerbate his head and neck pain." Pet. App. 4a (citation omitted). A physician under contract with the Postal Service examined petitioner and concluded that petitioner should not carry mail with a satchel based on petitioner's representations that it "increase[d]" or "aggravate[d]" his neck pain. *Id.* at 4a-5a. A neurosurgeon who examined petitioner nonetheless released him to "work duty without restrictions." *Id.* at 5a. Respondent Naewana Nickles, an occupational health nurse administrator with the Postal Service, requested a follow-up report. In response, the neurosurgeon stated that petitioner should not continue to carry mail with a satchel if doing so caused petitioner neck pain. *Id.* at 5a-6a. Because the only available mail carrier positions required the use of a satchel, Postmaster Derrickson did not return petitioner to mail carrier duties. *Id.* at 6a.

In August 1997, petitioner again requested transfer to a clerk position. Pet. App. 6a. Postmaster Derrickson approved that request, which became effective on August 30, 1997. *Ibid.* Petitioner claims that he attempted to withdraw his transfer request after learning that he was at low risk of injury if he carried mail with a waist harness, but that Derrickson denied the request. *Ibid.* According to Derrickson, however, petitioner never withdrew his transfer request. *Ibid.*

2. On October 30, 1997, petitioner contacted an Equal Employment Opportunity counselor complaining that the refusal to permit him to carry mail with a waist harness constituted disability discrimination. Pet. App. 7a. Petitioner subsequently filed a formal complaint of

discrimination. *Ibid.* Under the applicable federal regulations, a person aggrieved by alleged discrimination based on disability must consult with an EEO counselor within 45 days of the alleged discriminatory conduct. 29 C.F.R. 1614.105. Because petitioner failed to satisfy the 45-day requirement, the Postal Service dismissed his complaint. Pet. App. 8a.

On November 17, 1998, petitioner filed suit in federal district court, alleging that the refusal to permit him to carry mail using a waist harness violated his rights under the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq*, and the Americans With Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* Pet. App. 8a. The district court dismissed the action on the ground that petitioner had failed to consult with an EEO counselor within 45 days of the alleged discriminatory conduct. *Ibid.*

Petitioner filed a second lawsuit, in which he once again alleged that the refusal to permit him to work as a mail carrier with a waist harness violated the Rehabilitation Act and the ADA. Pet. App. 9a. Petitioner added several new claims, including a claim under the FMLA. *Ibid.* The district court granted summary judgment in favor of the respondents. *Id.* at 9a-10a. As relevant here, the court held that the claims against the Postal Service and the respondents in their official capacities were barred by claim preclusion, and that the FMLA does not impose individual liability on supervisory employees of public agencies. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-37a. The court held that claim preclusion barred the claims against the Postal Service and the postal officials in their official capacities. *Id.* at 11a-21a. The court reasoned that claim preclusion applies when a dismissal is "on the merits" and that a dismissal for failure to consult with~~in the~~ 45-day period, like a dismissal on

statute of limitations grounds, is a judgment "on the merits." *Id.* at 11a-16a.

The court next held that petitioner's individual capacity claims failed as a matter of law because the FMLA does not authorize individual capacity suits against supervisory employees of public agencies. Pet. App. 23a-37a. The court noted that the FMLA creates a private right of action entitling "eligible employees" to seek monetary and injunctive relief "against any employer (including a public agency)," 29 U.S.C. 2615(a)(1), 2617(a)(2), and that it defines "employer" as follows:

> (4) Employer
>
> (A) In general
>
> The term "employer"—
>
> (i) means any person engaged in commerce or in any industry * * * affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;
>
> (ii) includes—
>
> (I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and
>
> (II) any successor in interest of an employer;
>
> (iii) includes any "public agency", as defined in section 203(x) of this title; and

> (iv) includes the General Accounting Office and the Library of Congress.
>
> (B) Public agency.
>
> For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

29 U.S.C. 2611(4). See Pet. App. 30a-31a. The court concluded that three features of the statute demonstrate that the FMLA does not impose individual liability on supervisory employees of a public agency. *Id.* at 31a.

First, the statutory definition of employer "explicitly separates the individual liability provision and public agency provision into two distinct clauses." Pet. App. 30a. Specifically, while subsection (4)(A) uses an "em dash" to introduce related definitions of employer, and subsection (4)(A)(ii) uses an "em dash" to establish a relationship between the individual liability provision and the provision addressing successors in interest, the FMLA lacks punctuation demonstrating a relationship between the individual liability provision and the public agency provision. *Id.* at 31a-32a.

Second, the court concluded that "commingling of clauses (i)-(iv) into the term 'employer' yields an interpretation that renders other provisions of the statute superfluous, as well as creates several oddities." Pet. App. 32a. In particular, the court concluded that such commingling would: (1) render superfluous the provision specifying that a public agency shall be considered to be engaged in commerce (*id.* at 33a); (2) suggest that a public agency would have to employ more than 50 employees to fall within the statute, although it is "well-settled" that no such requirement

exists (*ibid.*); and (3) suggest that Congress intended to extend "specific protection to employees of the GAO and the Library of Congress from future successors in interest," which is so unlikely as to be "an exercise in absurdity" (*id.* at 34a).

Third, the court noted that, while the FMLA borrowed other provisions from the FLSA, it modified the FLSA definition of employer by disconnecting the private employer definition from the personal liability definition. Pet. App. 35a. That modification, the court concluded, is best viewed as correcting the ambiguity in the FMLA regarding personal liability so as to make clear that supervisory employees of public employers are not subject to personal liability. *Ibid.*

ARGUMENT

1. Petitioner contends that review is warranted to resolve a conflict in the circuits on the question whether the FMLA imposes individual liability on supervisory employees of public employers. Pet. 4-8. Review of that question is not warranted for three reasons.

First, the court of appeals in this case is the first court to conduct a thorough textual analysis to determine whether the FMLA imposes individual liability on supervisory employees of public employers. Only two other courts of appeals have addressed the issue: Both have given only limited consideration to the issue, and neither has addressed the textual points made by the court below.

Like the court of appeals in this case, the Eleventh Circuit has held that FMLA does not impose individual liability on supervisory employees of public agencies. *Wascura* v. *Carver*, 169 F.3d 683, 686-687 (1999). It did so, however, based entirely on an earlier Eleventh Circuit decision holding that a public official sued in his

individual capacity is not an employer subject to liability under the Fair Labor Standards Act. *Ibid.* The Eighth Circuit held that the FMLA imposes individual liability on supervisory employees of public employers, but its entire reasoning consists of the statements that the FMLA's definition of employer "plainly includes persons other than the employer itself," and "[w]e see no reason to distinguish employers in the public sector from those in the private sector." *Darby* v. *Bratch*, 287 F.3d 673, 681 (2002).

Because only two circuits besides the court below have addressed the issue, and because those two circuits have given the issue only limited consideration, the issue would benefit from further ventilation in the circuits. That process might result in the elimination of the conflict that currently exists. But even if it does not, future opinions are likely to take into account the extensive textual analysis of the court below in a way that helps to promote a more well-developed understanding of the issue. Review of the issue at this juncture would be premature.

Second, resolution of the question whether the FMLA imposes individual liability on supervisory employees of public agencies does not have sufficient practical importance to warrant the Court's review. Plaintiffs in FMLA actions involving public employers can obtain all available relief by suing their employers. Indeed, most of the FMLA's remedies are available *only* from the employer. See 29 U.S.C. 2617(a)(1); see also 29 U.S.C. 2614(c)(1) (requiring "employer" to maintain health benefits for employees on leave); 29 U.S.C. 2616(b) (requiring employer to keep and preserve records of FMLA compliance); 29 U.S.C. 2619(a) (requiring employer to post notices of employees' FMLA rights). The question whether petitioner could sue his

supervisors in their individual capacities assumed significance here for reasons peculiar to this case: Petitioner failed to satisfy the 45-day consultation period and therefore could not sue his employer directly; and the courts below held that the dismissal of the action against the Postal Service on that ground did not bar a subsequent suit against individual supervisors in their individual capacities. Pet. App. 17a-20a. Because FMLA plaintiffs who have meritorious claims generally can obtain complete relief from their employers, the question whether the FMLA imposes individual liability on supervisory employees of public employers is not of sufficient recurring importance to warrant the Court's review.

Finally, resolution of the question petitioner seeks to present would be complicated by the existence of an antecedent question. That antecedent question is whether the FMLA authorizes *any* individual capacity suits. The court below held that the FMLA does authorize individual capacity suits against supervisory employees of private employers, Pet. App. 27a-28a, and that is consistent with the view of the Secretary of Labor. 29 C.F.R. 825.104(a). Relying on an analogy to Title VII, however, some courts have held that the provision specifying that an employer includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer" (29 U.S.C. 2611(4)(A)(ii)(I)) does not authorize individual capacity suits, but instead establishes a principle of vicarious liability. Pet. App. 28a n.18. Because the United States generally has a responsibility to defend regulations issued by the Secretary of Labor, that antecedent question might not receive an adversary presentation in this case. That circumstance makes this case an inappropriate vehicle for resolving the antece-

dent question. And because resolution of the antecedent question is necessary for an intelligent resolution of the question petitioner seeks to present, this case is not an appropriate vehicle for resolving that question either.

2. Petitioner contends that a dismissal of an action based on a litigant's failure to meet with an Equal Employment Opportunity counselor within the mandatory time period is not "on the merits" for claim preclusion purposes. Pet. 8-13. That contention lacks merit and does not warrant review.

As the court of appeals recognized, the requirement that a litigant consult with an agency counselor within 45 days of the alleged discrimination is functionally the same as a statute of limitations. Pet. App. 14a. In both cases, compliance with the time period is a condition precedent to suit, and in both cases, once the time period expires, the plaintiff is permanently barred from bringing suit. *Ibid.* This Court's decision in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995), makes clear that a federal court's dismissal of a federal action on statute of limitations grounds is "on the merits" for claim preclusion purposes. See 18 *Moore's Federal Practice* § 131.30[3][g][i], at 131-111 (3d ed. 2004); 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4441, at 213-214 (2d ed. 2002). Because the dismissal at issue here has the same characteristics as a dismissal on statute of limitations grounds, it is also "on the merits" for claim preclusion purposes. Every court that has addressed the issue has reached that conclusion. See, *e.g.*, *Nwosun* v. *General Mills Rest., Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997), cert. denied, 523 U.S. 1064 (1998); *Kratville* v. *Runyon*, 90 F.3d 195, 198 (7th Cir. 1996); *Nilson* v. *City of Moss Point*, 701 F.2d 556, 562 (5th Cir. 1983) (en banc).

Petitioner relies on a handful of cases involving "condition precedents" to argue that dismissal for failure to satisfy a precondition to bringing suit does not preclude a subsequent lawsuit. Pet. 9-10. In each of the cases the petitioner cites, however, the condition precedent was still capable of being satisfied when the case was dismissed. See, *e.g.*, *Costello* v. *United States*, 365 U.S. 265, 268 (1961) (case dismissed for failure to file affidavit of good cause with complaint); *Truvillion* v. *King's Daughters Hosp.*, 614 F.2d 520, 524-525 (5th Cir. 1980) (case dismissed because of EEOC's failure to give prior notice to employer); see also *Criales* v. *American Airlines, Inc.*, 105 F.3d 93, 97 (2d Cir.) (res judicata does not apply where suit is dismissed for failure to comply with condition precedent and plaintiff "remained capable of complying with that precondition" following dismissal), cert. denied, 522 U.S. 906 (1997). Here, in contrast, dismissal of the first action was "the 'death knell' of the litigation" because petitioner was permanently foreclosed from meeting the long-expired deadline for seeking administrative relief. Pet. App. 15a (quoting *Wilkins* v. *Jakeway*, 183 F.3d 528, 534 (6th Cir. 1999)). The cases on which petitioner relies are therefore inapposite here.

Petitioner ultimately appears to argue that a court must consider the underlying facts of the claim for claim preclusion to apply. This Court, however, has squarely rejected that view. See *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 502 (2001).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

PETER D. KEISLER
Assistant Attorney General

MARK B. STERN
SHARON SWINGLE
Attorneys

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No. 03-1359

IN THE

Supreme Court of the United States

JOEY L. MITCHELL

Petitioner,

v.

GLENN CHAPMAN, RICK DERRICKSON, NAEWANA NICHOLS, WILLIAM J. HENDERSON, AND THE UNITED STATES POSTAL SERVICE

Respondents.

On Petition For Writ Of Certiorari To The Sixth Circuit Court of Appeals

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JAMES M. MORRIS
Counsel of Record
MORRIS & MORRIS, P.S.C.
217 North Upper Street
Lexington, KY 40507
(859) 281-6981
Counsel for Petitioner

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOEY L. MITCHELL, Petitioner, by the undersigned counsel, under appropriate rules of this Court, respectfully submits this Reply Brief in Support of his Petition for Writ of Certiorari, in order to address an issue raised in Respondent's Brief in Opposition.

I. *CONTRARY TO RESPONDENTS' ATTEMPT TO MINIMIZE THE CONFLICT, THE SPLIT IN THE CIRCUITS IS SUBSTANTIAL AND MUST BE RECTIFIED BY THIS COURT IN ORDER TO ASSURE UNIFORMITY.*

Respondents readily admit that a chasm exists between the circuit courts with regard to individual liability for public agency supervisors under the FMLA, but suggest, instead, that this Court sit idly while even ***more*** dissension and disagreement occur at the Circuit level. Such a proverbial "head-in-the-sand" approach is not warranted – especially when the issue has now been framed by the Sixth Circuit's rejection of ***both*** the Eighth Circuit's well-reasoned decision of *Darby v. Bratch*, 287 F.3d 673 (2002)(holding individual liability for public agency supervisors), as well as the oft-criticized decision rendered by the Eleventh Circuit, *Wascura v. Carver*, 169 F.3d 683 (1999)(holding no individual liability for public agency supervisors based upon previous Eleventh Circuit FLSA application).

By rejecting both previous decisions and by declaring that the Sixth Circuit intends to follow a third, completely unrelated approach from the other two Circuits, three of the eleven Circuits have now weighed in on this precise

issue – with all three taking drastically different approaches and reaching drastically different results. Such divergence among the Circuits is ***precisely*** the type of matter that should be resolved by this Court. Respondents' assessment that the issues raised herein would somehow "benefit from further ventilation in the circuits" is entirely without merit inasmuch as one of the primary purposes of seeking a Writ of Certiorari is to correct such inconsistencies at a time when the number of inconsistent results can be minimized and the matter can be properly addressed by this Court. *See, e.g., National Ass'n of Greeting Card Publishers v. U. S. Postal Service*, 103 S.Ct. 2717 (1983)(certiorari granted due to inconsistencies between the Second and District of Columbia Circuits).

More importantly, however, the Respondents have attempted to downplay the serious discrepancies which exist between the various courts that have addressed the issue presented on appeal by suggesting that the only courts to have addressed this particular issue are the Eighth Circuit and the Eleventh Circuit, and that the issue presented for Writ is thus simply not sufficiently widespread to warrant this Court's review. However, Respondents' position is erroneous, as is demonstrated by the ***vast*** number of district court opinions in addition to the three Circuit Court decisions that have addressed this issue and reached drastically differing results. *Compare Kilvitis v. County of Luzerne*, 52 F.Supp.2d 403, 412-13 (M.D.Pa. 1999)(same); *Carter v. USPS*, 157 F.Supp.2d 726, 728 (W.D.Ky. 2001)("[a]s modified by clause (A)(ii)(I) and (A)(iii), an "employer" includes both individuals and public agencies and therefore also includes individuals in public agencies. ***Common logic and standard rules of***

grammar permit no other reading"); *Johnson v. Fayette County*, 271 F.Supp.2d 1068 (W.D.Tn. 2003)("[t]he Court finds no rational basis to exempt [the] public sector [] from similar liability, where the language of the FMLA clearly expresses an intent to subject individuals to joint and several liability with their employers....a finding that public officials may be liable only in their official capacities would eviscerate the significance of Congress's clearly expressed intent to hold public officials individually liable"); *Cantley v. Simmons*, 179 F.Supp.2d 654 (S.D.W.Va. 2002)(same); *Morrow v. Putnam*, 142 F.Supp.2d 1271, 1272-73 (D.Nev. 2001)(A plain reading of the statute that supervisory government employees may be considered employers under the FMLA); *Meara v. Bennett*, 27 F.Supp.2d 288, 291 (D.Mass. 1998)("This language clearly suggests that individuals are contemplated as defendants...."); *Clay v. City of Chicago*, 1997 WL 106111, at *2 (N.D.Ill.1997) (denying motion to dismiss of public official defendant where allegations could be read to infer that public official "exercised supervisory authority over" plaintiff). *But see Keene v. Rinaldi*, 127 F.Supp.2d 770, 778 (M.D.N.C. 2000)(refusing to individual public agency supervisor liability although acknowledging that "it appears that a majority have found individual liability [for public supervisors]"[2]); *Wascura v. Carver*, 169 F.3d 683, 686-87 (11th Cir.1999)(finding government officers not liable in individual capacity under FMLA because Circuit precedent denies individual liability for government official in individual capacity under FLSA); *Carter v. Rental Uniform Serv. of Culpeper, Inc.*, 977 F.Supp. 753, 759 (W.D.Va.1997)(same).

As illustrated by the above, individual liability for

public agency supervisors, is in total disarray, with the Circuits being in complete disagreement, and the district and circuit courts acknowledging the divergence in the decisions and the crucial need for guidance and direction on this issue. Accordingly, Petitioner submits that the issue presented in the within Writ necessitates acceptance by this Court so as to provide uniformity to the decisions rendered in the differing Circuits and for direction to the lower courts that are routinely addressing the issue of individual liability for public agency supervisors under the FMLA.

CONCLUSION

WHEREFORE, based upon the foregoing, and based upon Petitioner's original Petition for Writ of Certiorari, Petitioner JOEY L. MITCHELL respectfully requests that this Court GRANT his Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in order to manifestly establish individual liability for public agency supervisors as set forth in the underlying statute, and to set forth guidance on the impact of a previous dismissal based upon a failure to meet a condition precedent on subsequent claims.

Respectfully submitted,

JAMES M. MORRIS
Counsel of Record
MORRIS & MORRIS, P.S.C.
217 North Upper St.
Lexington, KY 40588-0394
(859) 281-6981
Counsel for Petitioner

Dated: June 4, 2004